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No. 88, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA
Plaintiff,

vs.

STATE OF TEXAS, *et al.*,
Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

AND

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of California, by its duly authorized representative, Kenneth Cory, Controller, asks leave of the Court to file its Complaint against the State of Texas and other named parties submitted herewith.
March 12, 1981.

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MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT*

JURISDICTION

The original jurisdiction of the Court is invoked pursuant to Article III, Section 2 of the Constitution of the United States

* This Motion is intended to be considered together with the Petition for Writ of Certiorari filed in *Controller of the State of California v. Attorney General of the State of Texas,* No. 80-____, seeking review of the decision of the Court of Appeals for the Fifth Circuit in *Lummis v. White,* 629 F.2d 397 (5th Cir. 1980) (hereafter cited as "Cert. Pet.").

and 28 U.S.C. § 1251. The controversy concerns inconsistent claims by California and Texas that Howard R. Hughes was a domiciliary at the date of his death. If each state successfully imposes a domicile-based death tax in its own courts, the resulting state and federal tax claims will exceed the available assets of the estate. California asserts a lien on intangible assets of the Estate which is inconsistent with a like lien asserted by Texas. Collection of the Texas tax would interfere with California's property right in the lien it has on all intangible assets of the Estate, and would prevent California from collecting the entire death tax due it. The proposed Complaint accordingly seeks a determination of Hughes' domicile on the date of his death.

Jurisdiction to resolve inconsistent claims of domicile for state inheritance tax purposes in identical circumstances was established in *Texas v. Florida,* 306 U.S. 398 (1939). That decision has never been overruled, although three Justices of this Court have suggested that it was incorrectly decided. *California v. Texas,* 437 U.S. 601, 602 (1978)(Stewart, J., joined by Powell and Stevens, JJ., concurring).

In *California v. Texas, supra,* a similar motion for leave to file a complaint was denied. The Court gave no explanation for the decision. Changed circumstances impelled the filing of the present motion. As more fully discussed hereafter (*see* pp. 12-13, *infra*), several factors which may well have entered into the Court's decision not to apply *Texas v. Florida, supra,* to the previous application are no longer present. One such factor was the existence of a conditional settlement agreement between California and the Estate which Texas urged rendered the case collusive and not founded upon a justiciable case or controversy. That agreement is now a nullity; there is now no settlement agreement of any kind between California and the Estate. Texas also urged that the controversy was not ripe for adjudication because the issues could be affected by the pending claim of Howard Hughes Medical Institute ("HHMI") that a "lost will" left the entire estate to a charitable foundation and

the contention that the so-called "Mormon Will", which also purported to make substantial charitable bequests, was a valid testamentary instrument. The "Mormon Will" has now been definitively rejected following a trial by jury; likewise, the HHMI "lost will" claim has been rejected by the Nevada Supreme Court and by the Texas Probate Court. Complaint ¶2(b).

Another factor, expressly identified by Justice Brennan as the basis for his vote to deny the prior motion (*see id.* at 601 (Brennan, J., concurring)) was the possibility that the risk of inconsistent adjudications of domicile could be avoided by a statutory interpleader action in a federal district court. Although *Worcester County Trust Co. v. Riley,* 302 U.S. 292 (1937) had held that the Eleventh Amendment barred such an action, four justices suggested that *Worcester County* was no longer authoritative. However, none of the concurring opinions addressed the technical requirements of subject matter jurisdiction under the Federal Interpleader Act. For reasons explained at pp. 13-21 *infra,* and in the accompanying Petition For Certiorari in *Controller of the State of California v. Attorney General of the State of Texas,* the terms of the Interpleader Act do not confer district court jurisdiction to resolve this controversy. However desirable it may be to have a mechanism for the resolution of multi-state death tax disputes in a lower federal court, the Federal Interpleader Act was not designed for that purpose. The Hughes Estate has attempted to invoke it, and the result to date has been eloquent testimony that the use of the Act in this context tries to force a square peg into the proverbial round hole. Accordingly, it can now "be shown that two States may possibly be able to obtain conflicting adjudications of domicile." *California v. Texas, supra,* 437 U.S. at 601 (Brennan, J.). For this and other reasons hereafter discussed, a proceeding under the Interpleader Act is not an available or appropriate alternative to an original suit here. Jurisdiction is therefore properly invoked under *Texas v. Florida, supra.*

STATEMENT

On April 5, 1976, Howard Robard Hughes, Jr. died in a chartered jet which was rushing him from Mexico to a hospital in Texas. His sizeable estate is now the subject of probate proceedings pending in California, Texas, and Nevada, each of which was arguably the state of Hughes' domicile.[1]

Both California and Texas contend that Hughes was a domiciliary of their respective jurisdictions. Each state accordingly seeks to collect the resulting inheritance tax on all intangible assets of the Estate. The effect of the multiple taxation by both California and Texas would be the imposition of death taxes which substantially exceed the net assets of the Estate. The effective rate of tax in California on all amounts in excess of $400,000 is 24% (*see* CAL. REV. & TAX. CODE § 13406(g));[2] the effective rate of tax in Texas (including the so-called "pick-up tax") on amounts exceeding $1,000,000 is approximately 16% (*see* TEX. TAX CODE ANN. ARTS. 14.05, 14.12); and the federal estate tax on amounts in excess of $10,000,000 is 77%, less a credit of 16% for state death taxes (*see* 26 U.S.C. §§2001, 2011). The combined marginal rate of tax is therefore 101%. Complaint ¶ 22. Interest on the unpaid taxes is accruing at the rate of 12% (except on the Texas tax, which accrues interest at 6%), increasing the total tax liability. *Id.* Moreover, some actual expenses of the Estate are not fully deductible in computing these various death taxes. *Id.* The shortfall if both Texas and California obtain favorable judgments is therefore likely to be even greater than adding the several tax rates together would suggest. The total state and federal taxes and interest claimed substantially exceed the available assets of the Estate. *Id.*

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[1] There are also probate proceedings pending in Louisiana and Delaware but no claim has been advanced that Hughes was a domiciliary of either of those states.

[2] Under California law, decedent's next-of-kin (and, *a fortiori*, the remaining heirs) are classified as "Class C Transferees", who are subject to the maximum rates. Lesser rates would have been applicable if Hughes had left a wife, lineal issue or nieces or nephews. *See id.* §§13307, 13308, 13309.

Texas has secured a verdict, after a trial by jury in a Texas state court, finding that Hughes was a domiciliary of Texas. Complaint ¶15. California has been restrained from proceeding in its own courts by the federal proceeding described below. If the Court does not allow the invocation of its original jurisdiction, California is prepared to press its domicile claim in its courts, unless restrained from doing so, even though the result will be inconsistent state court determinations.

As a result, Texas and California are on a collision course. Texas asserts a statutory lien on all intangible assets of the Estate; California alleges that its own lien on those same assets is valid and that the Texas lien is not. Complaint ¶24. Further, whichever state perfects and executes its judgment will irreparably injure the other by depriving it of the very assets needed to satisfy the tax. There is substantial reason to believe that Texas will precede California in executing upon a final judgment. The overwhelming majority of the Estate's tangible assets are located outside of California, and of course the Estate intends to administer the intangible assets in one or more states other than California. Complaint ¶26. Accordingly, it is likely that California will be irreparably injured by being unable to satisfy its judgment for taxes and interest. *Id.*

In November, 1977, California sought to avoid these unfortunate consequences by filing a motion for leave to file a complaint under this Court's original jurisdiction. The Court denied California's motion. *California v. Texas, supra.* As noted, the Court gave no explanation for its action, although concurring opinions for four Justices suggested that the Eleventh Amendment no longer barred the use of the Federal Interpleader Act (28 U.S.C. §1335) as a means of obtaining a determination of domicile binding on all parties. The present motion has been filed because it can now be demonstrated that even if the Eleventh Amendment no longer applies, the suggested alternative means of resolving the controversy—a statutory interpleader proceeding in a United States District Court—is *not* possible; even if it were, it would be a wholly

unsuitable and unfair means of adjudicating the conflicting domicile claims of California and Texas.

As shown in Part II(A), *infra,* even if the Eleventh Amendment no longer imposes a barrier, the particular jurisdictional requirements of the Federal Interpleader Act cannot be satisfied in cases of this kind. Although in *Lummis v. White,* 629 F.2d 397 (5th Cir. 1980) the Court of Appeals for the Fifth Circuit reached a contrary conclusion based upon an anomalous feature of California law (*see* Cert. Pet. at 12), that statute has been revised and the basis upon which the Court of Appeals found jurisdiction is no longer present. *See* pp. 18-20, *infra; see also* Cert. Pet. at 18-23. Moreover, at least after jurisdiction attaches, an interpleader action instituted by an estate against two or more states becomes a "controvers[y] between two or more States" within this Court's original and exclusive jurisdiction under 28 U.S.C. § 1251(a) because the rival states are thereby required to contest their domicile claims against each other. *See* Part II(B), *infra.* In any case, as shown in Part II(C), *infra,* an important factor not considered in *California v. Texas* renders the Interpleader Act an unfair and inappropriate alternative remedy. Under the Act, venue can only be laid where the "claimants" reside, which means that one state's death tax claim will be decided by a jury of citizens of the rival state. Only through the exercise of this Court's original jurisdiction can there be assured a neutral forum appropriate for the resolution of a controversy between, and affecting the vital interests of, two sovereign states.

ARGUMENT

I.

UNDER *TEXAS V. FLORIDA*, THIS COURT'S ORIGINAL JURISDICTION HAS BEEN PROPERLY INVOKED.

The Court's jurisdiction to adjudicate the conflicting domicile claims of California and Texas is established by *Texas v. Florida,* 306 U.S. 398 (1939). There, on facts remarkably like those presented here, the Court accepted jurisdiction over an

original proceeding involving conflicting inheritance tax claims by four states, each of which had asserted that the decedent was a domiciliary. The Court acknowledged that inconsistent adjudications of domicile and the accompanying imposition of multiple inheritance taxes were constitutionally tolerable (*id.* at 410; *see* pp. 13-14, *infra*) and that the judgments of each state assessing tax liability were binding upon the parties to the proceedings and entitled to full faith and credit. *Id.* But while no federal question is presented by multiple and inconsistent imposition of domicile-based inheritance taxes, the Court found appropriate the invocation of its original jurisdiction where the claims of the respective states (and the federal estate tax) exceeded the net assets of the estate:

> "The essential of the bill in the nature of interpleader is that it calls upon the court to exercise its jurisdiction to guard against the risks of loss from the prosecution in independent suits of rival claims where the plaintiff himself claims an interest in the property of fund which is subjected to the risk. The object and ground of the jurisdiction are to guard against the consequent depletion of the fund at the expense of the plaintiff's interest in it and to protect him and the other parties to the suit from the jeopardy resulting from the prosecution of numerous demands, to only one of which the fund is subject." (*Id.* at 406-07). [3]

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[3] Justice Stewart summarized the decision in *Texas v. Florida* in his concurring opinion in *California v. Texas,* supra:

> "Although none of the parties raised any question of this Court's jurisdiction, the Court considered the question sua sponte. It held that since the suit was between States, Art III, §2 of the Constitution conferred original jurisdiction to decide the case so long as 'the issue framed by the pleadings constitutes a justiciable "case" or "controversy" within the meaning of the constitutional provision and . . . the facts alleged and found afford an adequate basis for relief according to accepted doctrines of the common law or equity systems of jurisprudence . . . .' 306 U.S. at 405.

(footnote continued on following page)

The present case is squarely within the holding of *Texas v. Florida*. Here, as in that case, there is a "fair probability" of inconsistent findings of domicile resulting in death taxes in excess of the Estate's assets. Indeed, that result is far more probable than it was in *Texas v. Florida*. In this case, Texas has already obtained a favorable jury verdict finding a Texas domicile. The risk of an inconsistent finding by a California tribunal is a substantial one. Like the decedent in *Texas v. Florida, supra*, Howard Hughes lived so "as to afford substantial basis" (306 U.S. at 411) for multiple claims of domicile.

Born in Houston, Texas in 1905, Hughes resided in Texas until 1926 when, at the age of 20, he moved to California. From the time he moved to California until the day he died, Hughes apparently returned to Texas only for occasional visits. Nonetheless, he continued to use Texas as a mailing address and occasionally claimed Texas as his domicile long after he ceased to have any physical presence there.

(footnote continued from previous page)

> "The Court found such a basis for relief by analogizing the suit to a bill in the nature of interpleader. This procedure had developed in equity to avert the 'risk of loss ensuing from the demands in separate suits of rival claimants to the same debt or legal duty' by requiring the claimants to 'litigate in a single suit their ownership of the asserted claim.' *Id.* at 405-406. Since the law of each of the claiming States provided that a decedent could be domiciled in only one State for purposes of death taxes, the Court held that the competing tax claims were in fact conflicting claims to the same single legal duty.
>
> "Thus viewing the suit as one in the nature of interpleader, the Court also found that the controversy was ripe for decision. Since each State's claim was sufficiently substantial to support a finding of domicile, there was a 'fair probability' that each would be successful in its own courts and that the estate's assets would be insufficient to meet all of the claims. The Court therefore found a justiciable present controversy in the substantial 'risk of loss[to] the state lawfully entitled to collect the tax.' *Id.*, at 410-411. The Court perceived no jurisdictional frailty in the fact that none of the claiming States had completed proceedings to collect its inheritance tax, since a plaintiff in an interpleader action was ordinarily not required to await actual institution of independent suits: '[I]t is enough if he shows that conflicting claims are asserted and that the consequent risk of loss is substantial.' " (437 U.S. at 604-06).

Hughes lived in California for 40 years, from 1926 to 1966. During this time, he developed substantial new business interests and investments, including film production, aviation and aircraft manufacture, and numerous other ventures in California. Until his death, the center of his business operations remained in California, although he acquired substantial property elsewhere, both directly and through his wholly-owned corporation, known in later years as Summa Corporation.

In 1966, Hughes travelled to Boston, where he spent five months. He then travelled to Las Vegas, where he remained until 1970. Thereafter he moved his retinue from place to place, travelling successively to the Bahamas, Nicaragua, Vancouver, London, and the Bahamas again, eventually arriving in Acapulco, Mexico. So far as is known, Hughes formed no personal roots in Nevada or in any subsequent location, living in almost total seclusion in a hotel room from which he seldom, if ever, ventured. In early April, 1976, while in Acapulco, Hughes became critically ill and was rushed by plane for medical treatment to Houston. He died en route.

While even this bare outline of Mr. Hughes' life demonstrates that different jurisdictions applying the same legal definition of domicile could well reach conflicting conclusions, there are several additional reasons why inconsistent findings of domicile are entirely likely. First, Hughes made "numerous self-serving statements . . . as to his domicile, which, because made for the purpose of avoiding liability for state . . . taxes levied on the basis of domicile, tended to conceal rather than reveal the true relationship" (*Texas v. Florida, supra*, at 411) of Hughes to the various jurisdictions in which domicile is claimed. Second, Hughes' business interests and investments were extraordinarily diverse, both in terms of geographical location and field of commercial endeavor, despite the fact that the "communications center," through which he controlled his vast empire, remained in California throughout his travels. Finally, the usual indicia of domicile, such as the establishment of a permanent place of residence, the presence or absence of

personal effects and community involvement, are absent in this case. Hughes lived in an unusual, indeed, bizarre manner. "Home" for Hughes during the last ten years of his life was a series of barren hotel rooms from which social and business visitors were almost entirely excluded. One of the world's richest men lived in a virtually sealed capsule, communicating with his empire at long distance. It hardly mattered where that capsule was.

This case is thus a paradigm of the problems inherent in the domicile concept. While the "hornbook law" of domicile of both California and Texas can be simply stated—"domicile" equals "physical presence" plus "intent to remain"—the concept of domicile is easier to define than to apply. Not only does one legal concept have to fit an infinite variety of living situations, the determination of domicile usually hinges on the elusive finding that the decedent intended to make a place his home. And what at first blush may appear as most direct evidence of requisite intention—a person's statements—will often be more the reflection of calculated advantage than of an actual intention to establish a permanent home. *See Texas v. Florida, supra*, at 411. That will also be true in this case. The risk of inconsistent adjudications of Hughes' domicile is thus exacerbated by the manner in which decedent lived, by what he said, and by the ephemeral nature of the domicile concept.[4]

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[4] Professor Reese has succinctly described the difficulties inherent in the ascertainment of domicile:

> "The rules relating to the determination of domicile are extremely general and flexible in operation, revolving as they generally do around the intention to make a home. And, in close cases, differing inferences as to this intention can easily be drawn from the evidence presented. . . .[¶] The rules of domicile are extremely flexible in application, both because of their generality and because they depend so frequently in ultimate analysis upon the determination of a question of fact as to the individual's attitude of mind towards the place in question." (Reese, *Does Domicile Bear a Single Meaning?*, 55 COL. L. REV. 589, 591-96 (1955)).

Justice Stewart, who urged in *California v. Texas* that *Texas v. Florida* should be overruled, forthrightly stated that the proposed complaint in that prior application was squarely within the jurisdictional path established in *Texas v. Florida:*

> "The facts alleged in the complaint now before us are indistinguishable in all material respects from those on which jurisdiction was based in *Texas v. Florida.* This Court has original and exclusive jurisdiction of disputes between two or more States, 28 U.S.C. §1251(a)(1) and it has a responsibility to exercise that jurisdiction when it is properly invoked. *See Cohens v. Virginia,* 6 Wheat. 264, 404; *Massachusetts v. Missouri,* 308 U.S. 1, 19-20. If *Texas v. Florida* was correctly decided, the Court, therefore, is under a duty in this case to grant California's motion to file its complaint." (437 U.S. at 606).

In an important respect this case is an even stronger one for the exercise of the Court's original jurisdiction than *Texas v. Florida, supra.* In that case the total net estate was exceeded by death taxes only on the hypothesis that, in addition to the federal estate tax, inheritance taxes would be levied by no less than *four* states; if only one of the four claimant states failed to establish domicile in its tax proceedings, the assets of the estate would have been sufficient to satisfy the tax claims of those remaining. In short, jurisdiction was founded upon the "danger that out of the same events four state courts will spell four different domiciles . . . ." 306 U.S. at 431 (dissenting opinion). In the present case, the high rates of taxation which are applicable create a circumstance in which the courts of only *two* states need disagree as to the decedent's domicile for the assets of the Estate to prove insufficient to meet the resulting tax claims. And, unlike *Texas v. Florida,* one of those states —Texas—already has a favorable jury verdict.

Nevertheless, this Court denied the prior motion for leave to file. We do not know, of course, the reasons which impelled the Court to do so, other than those expressed by four Justices

in concurring opinions. But a number of factors urged in opposition to the prior motion, some of which may have influenced the Court, are no longer even arguably applicable as grounds for denying leave to file the Complaint. Much has happened since 1978 to demonstrate the need for the exercise of this Court's original jurisdiction and the lack of any suitable alternative forum.

One factor strenuously urged by Texas as requiring denial of the prior motion was the provisional settlement agreement between the Estate and California. In that agreement, the Estate agreed to pay an 18% tax to California *if* this Court entertained the suit against Texas and found that Hughes was not domiciled in Texas. Texas protested that this agreement was collusive, that the agreement amounted to a "sale" of access to this Court's original jurisdiction, that California lacked clean hands, and that there was no genuine case or controversy. At oral argument, several Justices expressed concern over the possibility that, under the agreement, an 18% tax would be paid to California even if Nevada were found to be the domicile. That settlement agreement has now expired by its own terms, and the relationship between California and the Estate is now wholly adversary. Complaint ¶ 2(a). We fully expect that, if leave to file is granted, the controversy between all parties will be vigorously contested.

It was also urged in 1978 that the controversy was premature because the "lost will" claim of Howard Hughes Medical Institute and the validity of the so-called "Mormon Will" had not yet been determined. Texas argued that if the HHMI lost will claim were sustained, there would be no inheritance tax as the alleged will devised all assets to a charitable foundation. Similarly, the Mormon Will left substantial assets to charity, and Texas urged that the resulting deductions for charitable bequests would eliminate the risk that taxes would exceed the Estate's assets.

The Mormon Will was found to be not genuine following a trial by jury. No appeal was taken and the judgment is now final. Complaint ¶ 2(b). The HHMI lost will claim was also rejected by a final judgment of the Nevada Supreme court. Complaint ¶ 2(b). A Texas probate court has reached the same conclusion. *Id.*

From the concurring opinions, it appears that considerable weight was given the possibility that an alternative forum for the resolution of the conflicting tax claims might be available in a District Court under the Federal Interpleader Act. In the next section, we shall show that this expectation of the concurring Justices was mistaken. We shall also show that, even if jurisdiction could technically be established, the problem of venue makes the use of the Interpleader Act wholly unsuitable for adjudicating the rival tax claims of sovereign states. Then, in Part III, we will discuss Justice Stewart's argument—subscribed to by two other members of the Court—for the overruling of *Texas v. Florida.*

II.
THERE IS NO SUITABLE ALTERNATIVE FORUM.

Certain fundamental propositions will not be disputed.

First, California was not a party to the Texas proceedings and will not be bound by any determination of domicile made therein. *Texas v. Florida, supra*, at 411; *Riley v. New York Trust Co.*, 315 U.S. 343 (1942). A Texas court has found that Hughes was a domiciliary of Texas and that Texas can impose its inheritance tax, but California will not be bound by that judgment.

Second, California is therefore free to determine, inconsistently with any Texas judgment, that Hughes died domiciled in California and to tax the Estate and heirs accordingly. *Nevin v. Martin*, 307 U.S. 615 (1939)(per curiam), *aff'g* 22 F. Supp. 836 (D.N.J. 1938). In that event, neither the Texas judgment nor the California judgment will be reviewable in this Court because no federal question is presented. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937); *Texas v. Florida, supra*, at 410-11.[5] Indeed, the Court has consistently refused to review

[5] The Court said in *Worcester County Trust Co. v. Riley, supra,* at 299-300:

"Petitioner's real concern is that the judgment of the California court, if it should decide that decedent was domiciled there, may

(footnote continued on following page)

inconsistent adjudications of domicile. *See, e.g.*, the denials of certiorari in *Estate of Dorrance*, 287 U.S. 660 (1932); 288 U.S. 617 (1933); and 298 U.S. 678 (1936).

Third, unless the Federal Interpleader Act provides an avenue of relief—a subject to which we will turn in a moment—the heirs and the estate are without remedy. They may not enjoin in federal court the collection of the tax by either state (*Hill v. Martin*, 296 U.S. 393 (per curiam), *aff'g* 12 F. Supp. 746 (D.N.J. 1935)) because, *inter alia*, of the anti-injunction rule of 28 U.S.C. §2283; *see also* 28 U.S.C. §1341. As already noted, inconsistent adjudications by the state courts are not reviewable in this Court on certiorari. Finally, the arbitration processes established by the Uniform Act on Interstate Arbitration of Death Taxes (*see* CAL. REV. & TAX. CODE §§14197-14197.13) and the alternative statutory arbitration procedure in force in several states (*see id.* §§14199-14199.13) are unavailable because Texas has not adopted either of those Acts. *See* CCH INHERITANCE, ESTATE & GIFT TAX REPORTER ¶12,035.

Fourth, neither state has any remedy against the other except by original suit in this Court. As just noted, the arbitration mechanism is unavailable because Texas has not adopted the Uniform Act or any comparable law providing for arbitration. Neither state can obtain jurisdiction over the other

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be erroneous or may conflict with that of the Massachusetts courts. But conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action. Differences in proof and the latitude necessarily allowed to the trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses, might lead an appellate court to conclude that in none is the judgment erroneous. In any case the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error [citations] or require that pronouncements shall be consistent, [citation]. Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries [citations]. Hence it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States."

absent a voluntary appearance; beyond that, this Court's original jurisdiction over controversies between states is exclusive. 28 U.S.C. § 1251(a); *California v. Texas, supra*, 437 U.S. at 606 (Stewart, J., concurring).

Thus, one is brought to the suggestion of the concurring opinions in *California v. Texas* that relief might be had under the Federal Interpleader Act. The discussion in the opinions of Justice Brennan, Justice Stewart and Justice Powell all focused on the Eleventh Amendment issue arising from this Court's earlier holding in *Worcester County Trust Co. v. Riley, supra*, that such a suit under the Federal Interpleader Act was barred by the Eleventh Amendment. The concurring opinions argued that *Worcester County* had, in this respect, been undercut by *Edelman v. Jordan*, 415 U.S. 651 (1974).

The concurring opinions appear to have assumed that, if the Eleventh Amendment no longer barred an interpleader suit in a district court, subject-matter jurisdiction under the Federal Interpleader Act could be established. However, that issue was not briefed, was not discussed at oral argument, and was not considered in any of the opinions. In fact, the issue is far more difficult than the Court may have thought. It has been carefully explored in the aftermath of *California v. Texas*. Problems of jurisdiction and procedure which this Court could not possibly have envisioned have now surfaced.

It will be helpful, as a prelude to discussing these matters, to recount the procedural history of the litigation after the decision in *California v. Texas*.[6] Three weeks after that decision, the Estate filed the present action in the United States District Court for the Western District of Texas. Among those joined as defendants were the taxing officials of California and Texas.

California made two related motions in the fall of 1978. First, it asked the District Court to enter an order adding as

[6] *See also* Cert. Pet. at 3-6.

defendants some twenty-two persons whom the Estate has recognized as the heirs of Howard Hughes. Second, it asked the Court to transfer the action to a neutral forum—the District of Colorado—which all parties concede was *not* the domicile of Hughes. California urged that this case should not be heard in a forum whose residents have—through their interest in the treasury of their state's government—an interest in the outcome. Both of these motions were denied by the District Court in November, 1978. The venue motion was denied on the ground that transfer to a neutral forum could not be accomplished under the existing venue provisions of the Interpleader Act. *See* Cert. Pet. at 23-30; *see also* pp. 23-26, *infra*.

Following these rulings, California filed a Motion to Dismiss, which was heard in tandem with a previously filed motion by Texas. In July, 1979, the District Court issued an order granting the motions, finding that Plaintiff had not shown jurisdiction under the Federal Interpleader Act. *Lummis v. White*, 491 F. Supp. 5 (W.D. Tex. 1979). The court concluded that although Plaintiff's First Amended Complaint named some ten defendants, there was only one defendant—the County Treasurer of Los Angeles—who was both a "claimant" to property in Plaintiff's custody or possession *and* a "citizen of a state" for diversity purposes. (Although California and Texas are also "claimants", the District Court correctly held, in accordance with *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482(1894) that states are not "citizens of a state" for purposes of diversity jurisdiction.) The court thus held that the minimal diversity of citizenship required by Section 1335 was lacking. The Estate appealed from this order and California cross-appealed, contending that the District Court's denial of its motions to add parties and change venue was erroneous.

On appeal, the Court of Appeals reversed the District Court's finding of lack of interpleader jurisdiction, but affirmed its orders denying California's motions. *Lummis v. White*, 629 F.2d 397 (5th Cir. 1980). The court held that the Texas Administrator of the Estate is also a "claimant" under the

interpleader statute, and that "the citizenship of an interested stakeholder may be considered for purposes of establishing diversity under section 1335." *Id.* at 403. Since the Administrator's citizenship is diverse to that of the County Treasurer of Los Angeles, the Court held that interpleader jurisdiction was established. On the issues presented by California's cross-appeal, the Court held that joinder of the prospective heirs was unnecessary (*id.* at 403-04) and that the District Court did not "abuse its discretion in denying the transfer of venue motion." *Id.* at 399 n.5.

For reasons we shall now discuss, the matter cannot end there. The Federal Interpleader Act does not provide an alternative and adequate forum for the determination of this controversy.

A. As the Federal Interpleader Act Is Presently Framed, a District Court Does Not Have Subject-Matter Jurisdiction of a Multi-State Domicile Dispute.

Fatal jurisdictional defects preclude the Estate's use of the Federal Interpleader Act. At the heart of those problems is a statute plainly not designed for the purpose of resolving inconsistent death tax claims pressed by sovereign states. Its jurisdictional requirement is set forth in 28 U.S.C. §1335(a)(1):

> "The district court shall have original jurisdiction of any civil action . . . in the nature of interpleader filed by any person . . . having in his . . . custody or possession money or property of the value of $500 or more . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property . . . ."

The Interpleader Act thus requires that the plaintiff show (1) that there are at least two claimants to money or property in its "custody or possession"; and (2) that at least two of these claimants are "citizens of different states" under Section 1332, the federal diversity statute.

The jurisdictional problem arises because this Court has long held that a state is not a "citizen of a state" for diversity purposes. *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482 (1894). Likewise, suits against a state agency or official are deemed suits by or against a state, and thus are not within federal diversity jurisdiction. *Craig v. Southern Natural Gas Co.*, 125 F.2d 66, 67 (5th Cir. 1942)(suit by state tax collector against citizen of another state); *People ex rel. McColgan v. Bruce*, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942)(same). Thus the taxing officials of California and Texas—who are indisputably "claimants"—are not "citizens" for diversity purposes and their presence does not support jurisdiction.

In *Lummis v. White*, 629 F.2d 397 (5th Cir. 1980), the Fifth Circuit did not question these principles, which the District Court had applied in dismissing the action. However, it thought jurisdiction could be premised on two unique aspects of this case.

It first held that the Texas administrator, who had initiated the federal interpleader suit, was an "interested stakeholder" who was thus also a "claimant"; therefore, it concluded, the administrator's citizenship could be considered for purposes of establishing jurisdiction. In the Petition for Certiorari, we show why this decision is unsound and could work an unintended, radical expansion of federal jurisdiction. *See* Cert. Pet. at 15-18.

But whatever may be said of this conclusion, the second prong of jurisdiction found by the Court of Appeals has now been completely eradicated by subsequent events. The Court of Appeals initially held that the requirement of a second "claimant" of diverse citizenship to the Texas administrator was satisfied by the joinder of H. B. Alvord, the County Treasurer of Los Angeles County. Alvord's "claimant" status derived from a peculiar feature of California law by which the *state* inheritance tax was initially collected by the *county* treasurer, who retained

a small fraction of the tax as compensation for that administrative service and remitted the balance of the tax to the State Controller. *See* Cert. Pet. at 3 n.3. Because a *county* officer is a "citizen of a state" for diversity purposes (unlike a *state* officer), Alvord was deemed to satisfy the minimal diversity requirement of Section 1335. 629 F.2d at 403. Thus, although federal interpleader jurisdiction would not be present in controversies involving other states in which the death tax is paid to the state and not a county officer, this anomalous feature of California law was seized upon to save this one case from dismissal for want of jurisdiction.

After the time for petitioning for rehearing had expired, an extensive revision to the California inheritance tax law became effective. As explained in detail in the Petition for Certiorari, effective January 1, 1981 the county treasurer's peculiar role in tax collection was eliminated, and the entire inheritance tax is now to be paid directly to the State of California. A. B. 2092, Ch. 634, Cal. Stats. 1980.

This new legislation completely eliminated any interest Alvord may have had in the death tax claim of California against the Hughes Estate. Whatever may have been the case when the Court of Appeals rendered its original opinion, it is clear that Alvord is *not* now a "claimant" to any portion of the funds which are the subject of the federal interpleader action. In the language of the Act, he is no longer a person who is "claiming or may claim to be entitled to . . . money or property" in the stakeholder's custody or possession. 28 U.S.C. § 1335(a)(1). The State of California (and Mr. Cory, as its Controller) is the sole claimant of any inheritance tax due under the laws of California; of course, neither California nor Cory is a "citizen" of that State for purposes of federal diversity. Thus the jurisdictional requirement of Section 1335—that there be "two or more adverse claimants, of diverse citizenship as defined in Section 1332"—simply cannot be satisfied. The federal interpleader action suggested in the concurring opinions of *California v. Texas* thereby falters on a

ground neither briefed by the parties nor discussed in those opinions.[7] *See* Cert. Pet. at 18-23.

It is now clear, therefore, that the hope expressed in the concurring opinions that the Federal Interpleader Act might be an appropriate vehicle for resolving multi-state domicile disputes cannot be realized. The Court of Appeals' strained interpretation of the jurisdictional requirements of the Act could, at best, have served to create a special basis for jurisdiction applicable to the Howard Hughes case; absent the peculiar feature of the former law of California which gave the country treasurer a small interest in the matter, a dispute between two or more states over domicile could not be heard in a federal district court under the Interpleader Act because states are not "citizens" of states for diversity purposes. At best, therefore, the original solution of the Court of Appeals was applicable only in the unique circumstances of this case (and then only so long as the law of California remained unchanged until January 1, 1981). In any future dispute of this kind, including controversies involving the State of California, jurisdiction under the Interpleader Act will not be available. And, because of the change in California law eliminating Alvord's "claimant" status, the Interpleader Act cannot even be used to resolve the immediate controversy.

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[7] The Court of Appeals declined to grant leave to file a petition for rehearing out of time in order that this subsequent development might be considered. The Petition for Certiorari provides a vehicle by which this Court could either address the question in the first instance or remand to the Court of Appeals for reconsideration in light of this subsequent legislative development affecting jurisdiction. Failing that, California will be obliged to raise the loss of jurisdiction in the District Court, which will have no alternative but to dismiss the interpleader action.

B. An Interpleader Suit Brought by an Estate To Settle the Inconsistent Death Tax Claims of Two or More "States" Is a "Controvers[y] Between Two or More States" Under 28 U.S.C. §1251(a) and Is Within the Original and Exclusive Jurisdiction of the Supreme Court.

Section 1251(a) of the Judicial Code gives this Court "original *and exclusive* jurisdiction of *all* controversies between two or more States." (Emphasis added). This grant of exclusive jurisdiction prohibits all other courts from adjudicating disputes between states. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n,* 61 F.R.D. 588 (D.D.C. 1974); *Friedberg v. Santa Cruz,* 86 N.Y.S.2d 369, 274 App. Div. 1072 (1949); *DeMiglio v. Paez,* 189 N.Y.S.2d 593, 18 Misc. 2d 914 (1959). Even if the Federal Interpleader Act otherwise could be read to cover the present case, if the action involves a "controvers[y] between two or more States", Section 1251(a) precludes any federal district court from entertaining the action, for the specific jurisdictional statute—in this case, the one which reserves controversies between states to this Court—controls over the general. *Preiser v. Rodriguez,* 411 U.S. 475, 489 (1973).

There can be little doubt that the statutory interpleader action instituted by the Estate results in a "controvers[y] between two or more States. The object of the suit is to resolve the conflicting tax claims of two states, California and Texas. Under the law of each state, a citizen has but one domicile. It follows that, if one state wins, the other must lose. Interpleader thus locks the competing states—who previously were free to proceed in their own courts and to impose death taxes without regard to the actions of the other state—in an adversarial position. It thus creates a controversy between states of the most concrete kind.[8] Under Section 1251(a), such an adjudication can only occur in this Court.

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[8] Justice Stewart's concurring opinion in *California v. Texas, supra,* states that the real controversy in cases of this kind is between each taxing state and the estate, not between the states themselves.

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C. Because Under the Interpleader Act Venue Must Be Laid in One or the Other of the Claimant States, Statutory Interpleader Is an Unsuitable Means to Resolve Multi-State Domicile Disputes.

The jurisdictional problems discussed above are not the only drawbacks to the proposed resort to the Federal Interpleader Act. Following the decision in *California v. Texas*, the attempted use of federal statutory interpleader by the Estate has revealed another critical aspect of the Act rendering it wholly unsuitable for the resolution of multi-state domicile disputes.

Section 1397 of the Act authorizes venue of a statutory interpleader suit in any district "in which one or more of the claimants reside." The claimants, of course, are the state taxing officials seeking to collect a death tax. Thus in *Lummis v. White*, venue was laid in the Western District of Texas, the district in which the Texas taxing officials reside. Alternatively, of course, suit could have been brought in the Eastern District of California, in which the California Controller resides. Venue could not be changed under 28 U.S.C. §1404(a) to any other district because that provision allows transfer only to a district

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437 U.S. at 611-12. Whatever the merits of this view *before* the invocation of an interpleader action (*see* Part III, *infra*), it surely cannot be the case *after* the court orders the claimants to contest their claims before it. Once that occurs, the states will necessarily be combatants vis-a-vis each other, since their claims are mutually inconsistent and both cannot prevail.

Nor does the fact that the interstate controversy arises only in the "second stage" of the interpleader action (i.e., when the interpleader claimants are compelled to litigate their claims against one another) remove the jurisdictional bar against hearing such cases in a federal district court. The grant of exclusive jurisdiction to this Court prohibits other forums from entertaining "all" interstate controversies, regardless of the stage in the proceedings when they arise. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n*, 61 F.R.D. 588 (D.D.C. 1974)(motion to intervene partially denied where grant would create interstate controversy and oust the district court of jurisdiction).

in which the action "might have been brought." *See Hoffman v. Blaski,* 363 U.S. 335 (1960).[9]

The result is that conflicting state tax claims under the Interpleader Act will be tried in a court—and very likely before a jury[10]—sitting in one or the other of the contending states. In this case, were the Federal Interpleader suit to go forward, the rival tax claims of the State of California and the State of Texas would be tried in the Western District of Texas, probably before a jury of Texas citizens. And the choice of venue is that of the stakeholder, who is free to pick the state with the lowest death tax rate, which is precisely what the Hughes Estate did in this case.

The essence of an interpleader suit to determine which of two states' domicile-based death tax claim is valid is that it is a controversy between two states. Whether or not such a suit in a District Court is, as we have urged (*see* p. 21, *supra*), foreclosed by this Court's exclusive jurisdiction over "controversies between two or more States" (28 U.S.C. §1251(a)), compelling one state to litigate its claim before a jury composed of citizens of the rival claimant state is unseemly and inappropriate. Such a forum—even if technically available—is not an adequate and fitting alternative forum in which California should be compelled to litigate its death tax claim. This is so for several reasons.

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[9] As we have said, California sought, in the District Court and the Court of Appeals, an order requiring the joinder of the acknowledged heirs of Hughes as additional "claimants". The District Court and Court of Appeals held that the heirs need not be joined because their interests were fully represented by the Texas administrator, a real party in interest under Rule 17. *See* 629 F.2d at 403-04. Had the heirs been joined, a change of venue under Section 1404(a) would have been possible, for as additional claimants their various residences could have been considered for venue purposes under Section 1397. Having declined to order the joinder of the heirs, the District Court ruled that transfer to a neutral forum was precluded by Section 1404(a), and the Court of Appeals affirmed. *Id.* at 399 n.5. The Petition for Certiorari seeks review of those rulings; but unless they are corrected, the statements in the text above correctly state the limited choices of venue available in a case such as this one.

[10] It is very probable that, in suits of this kind, any party can demand a trial by jury. *See* Cert. Pet. at 13 n.13.

First, the delicate nature of the adjudication is indisputable. In the proceedings to date, litigation of the state tax claims in the courts of California and Texas has been enjoined. The collection of taxes has been restrained. And two sovereign states are being asked to contest their conflicting tax claims in a single proceeding in a federal trial court.

Throughout our history it has been regarded as inappropriate to compel a state to resort to the tribunals of another state for redress. *Cf. Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971)(cataloguing reasons behind grant of original jurisdiction for suits between states and citizens of other states).[11] That reluctance should be greatly intensified where, as in this case, the dispute is between two states, and the tribunal sits in one of them. California should not have to litigate its dispute with Texas before a jury of Texas citizens.

Second, as the Interpleader Act presently is written, the finders of fact in a statutory interpleader action will necessarily have a pecuniary interest in the outcome because the suit must be brought in one or the other of the claimant states. In this case, because of the size of the Hughes Estate, that interest is not *de minimus. See* Cert. Pet. at 25-26.

The jurors' personal stake in the controversy alone makes a trial by jury in one or the other of the claimant states inappropriate. Indeed, where there is an alternative forum in this Court, proceeding before jurors of one claimant state deprives the other state of the disinterested trier of fact which due process of law requires.[12] *Cf. Tumey v. Ohio,* 273 U.S. 510

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[11] *See also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 288 (1888); *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419, 475-76 (1793); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1681 (4th ed. 1873)(reasons for exclusive jurisdiction of Supreme Court over interstate controversies).

[12] In the ordinary tax case, there are only two sides: the state and the taxpayer. Jurors are both citizens and taxpayers. While they have an interest in maximizing their state's revenue (and the courts have recognized that appeals to the pecuniary interests of juries in tax cases

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(1927)(village mayor who received $12 in costs if defendant convicted has disqualifying self-interest); *Ward v. Village of Monroeville,* 409 U.S. 57 (1972) (invalidating conviction by mayor's court whereby mayor, in addition to judicial functions, possessed executive responsibility for village finances which were affected by fines levied in his court); *Connally v. Georgia,* 429 U.S. 245 (1977)($5 fee for issuing search warrant disqualifies magistrate).[13]

Third, cases of this kind, if tried before a jury drawn from a claimant state's citizens, could be adversely affected by parochial feelings of regional pride. The determination of domicile in a death tax case inevitably involves conflicting interpretations as to the decedent's mental intent—that is, where the decedent felt his "home" was. This subjective determination inherently would be open to the risk that jurors would—despite instructions to the contrary—use their personal feelings about their home state as a guide to divining the feelings of the decedent.

Fourth, and of critical importance, a trial before a jury of citizens of one of the two claimant states simply cannot satisfy the imperative that justice not only be done, but appear to be done. For example, were the present controversy to be resolved in Austin (or, for that matter, in Sacramento) with a finding

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are improper, *see, e.g., Epperson v. United States,* 490 F.2d 98 (7th Cir. 1973)), jurors may also have sympathy as taxpayers for the individual or corporation against whom the tax is being asserted. Hence jurors bring to the ordinary tax case no preconceptions which might tip the scales of justice. But because this case is at bottom an *interstate* controversy, there are three relevant parties, not two: Texas, California and the Estate. A Texas juror might, as a Texan, be sympathetic with the State of Texas and, as a taxpayer, have a countervailing identification with the Estate. But he would be unlikely to feel empathy for California's tax claim.

[13] Of course, where the only fact-finders available to resolve a dispute all have a direct or indirect interest in the outcome, the "rule of necessity" applies and the case will be decided by the available judges or jurors. *Evans v. Gore,* 253 U.S. 245 (1920); *United States v. Will,*—U.S.—, 49 U.S.L.W. 4045 (1980).

that the decedent was a domiciliary of the forum state, suspicion would inevitably be created that the verdict was the result of the economic, emotional and personal considerations discussed above, rather than a product of careful deliberation on the evidence presented. Certainly the citizens of California would not perceive that justice had been done in an Austin trial in which a Texas domicile was found. That potential for bitterness and suspicion is exacerbated because the choice of forum under Section 1397 is the Estate's, which has within its power to select the forum with the lowest rate of death tax.

III.

TEXAS V. FLORIDA SHOULD NOT BE OVERRULED.

Three Justices of this Court have suggested that *Texas v. Florida, supra,* should be overruled. *California v. Texas, supra,* 437 U.S. at 602 (Stewart, J., concurring). For reasons already discussed, and others which follow, we respectfully suggest that *Texas v. Florida* was rightly decided, and should be applied to this indistinguishable case. Indeed, as we shall show, *Texas v. Florida* was not a distortion or misapplication of equitable principles; rather, it applied "accepted doctrines of . . . equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court." *California v. Texas, supra,* at 615 n.15 (Stewart, J.), quoting from *Texas v. Florida, supra,* 306 U.S. at 405.

Justice Stewart stated that "what is involved is unfairness to the *estate,* not to the taxing States" and that to the extent the purpose of the action is "to prevent the possibility that the estate will be subjected to double taxation, it does not present a dispute between two States within the original and exclusive jurisdiction of this Court." *Id.* at 611-12 (emphasis in original). Rather, "[t]he real dispute arises solely from the risk that one of the States will be left with an entirely valid but uncollectible tax judgment." *Id.* at 612. This, Justice Stewart argues, would be true even if "the two States were staking their tax claims to

the finite assets of the estate on entirely different grounds" in which case "the question of domicile would be irrelevant . . . ." *Id.* at 612-13. This risk of conflict, which Justice Stewart acknowledged "poses a sufficiently real threat to the estate" to justify an interpleader suit in a district court, "does not amount to 'clear and convincing evidence' of an actual injury of 'serious magnitude' inflicted by one State upon another." *Id.* at 614.

Perhaps the proposed Complaint in the prior application failed sufficiently to demonstrate the injury to California which the rival Texas tax claim causes. That Texas claim has now been reduced to a judgment. Many of the collateral issues such as the HHMI "lost will" claim and the "Mormon Will" claim have now been swept away. *See* pp. 12-13, *supra.* Whatever may be said of the prior application, we firmly believe that the proposed Complaint tendered herewith leaves no doubt that the Texas judgment poses a real, and present, threat to the rights of California.

In the first place, it is *not* true that "the conflict would be equally real if the two States were staking their tax claims to the finite assets of the estate on entirely different grounds." While the economic injury might be indistinguishable, the *legal underpinnings* of the conflict would not be. The laws of both California and Texas require a finding of domicile as a predicate of taxation, and both state's laws utilize an identical definition of "domicile." Complaint ¶23. Under the laws of California and of Texas, there can be but one domicile at any one time. *Id.* Thus there is more to this controversy than insufficient funds: California alleges that Texas is injuring its interest because Texas has pressed a claim, and secured a jury verdict, that is without legal and factual basis and which is wholly inconsistent with the rival claim of California. Complaint ¶¶23-24. In other words, under the laws of both California and Texas, the right to impose the asserted death tax depends upon establishing Hughes' domicile at the date of his death. If Texas is entitled to impose the tax, California is not; if California is entitled to tax this estate on the basis of domicile,

Texas is not. As a result, "the question of domicile" is not "irrelevant." It lies at the heart of the dispute between California and Texas.[14]

Justice Stewart nevertheless argued that "[t]he *injury* would be the same whatever the source of each State's claim upon the debtor." 437 U.S. at 615 n.15. While the resultant *injury*—the inability to collect a judgment for death taxes—might be the same in both instances, there are two critical differences. First, the *cause* of that injury in this case is, according to the allegations of the Complaint, that Texas seeks to collect a tax which is owed to California, not to Texas. In contrast, in the circumstances posited by Justice Stewart—unrelated claims against a debtor with insufficient funds—the cause of the injury would be the debtor's insufficient funds, and not some deficiency in the rival's claim. Were Texas seeking to recover from the estate upon an unrelated tort or contract claim, California might well have no legal basis for seeking relief, for the insufficiency of the assets alone arguably provides no legal basis for one creditor to seek relief against another.

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[14] Justice Stewart suggested that if this Court were to entertain the original suit, it might apply a federal law rule of decision other than the state law of domicile. Even were that so, the substantive rule of law this Court might hereafter apply has no bearing on the threshold question of whether, at present, there exists a controversy between the two states. Moreover, the assumption that the Court would invariably fashion a federal common law rule is unfounded. In original jurisdiction cases, the Court "appl[ies] federal law, *state law*, and international law as the exigencies of the particular case demand." *Kansas v. Colorado,* 185 U.S. 125, 147 (1902) (emphasis added). Here, there is no "conflict" of state laws, as the law of Texas and the law of California as respects the basis for taxation and the definition of domicile are identical. In such circumstances, though the Court has the power to disregard the substantive law shared by the contending states, it has previously chosen to apply the law of the states as the rule of decision. *See Wyoming v. Colorado,* 259 U.S. 419, 470 (1922). That, of course, was the approach taken in *Texas v. Florida, supra. See* 306 U.S. at 413-14, 424-27.

The second point of distinction is that both Texas and California claim to be more than unsecured creditors seeking payment from a limited fund; each state claims, under its own laws, to have a lien on the assets of the estate to secure payment of the taxes owed to it. This lien is a property right of obvious value and importance. The proposed Complaint asserts that the Texas lien on intangibles is invalid because Hughes was not domiciled in Texas. Complaint ¶24. It seeks relief, in the nature of removing a cloud on California's title to its lien, to protect California's security interest in the estate's assets. This form of relief is well known in courts of equity. *See generally* POMEROY'S EQUITY JURISPRUDENCE §§ 248-49, 1393-94 (5th ed. 1941).

Justice Stewart's opinion acknowledges that "the risk of conflict [between the California and Texas tax claims] poses a sufficiently real threat to the estate to present a ripe controversy if an interpleader suit were filed by the appropriate parties in a federal district court," but argues that this "risk certainly does not amount to 'clear and convincing evidence' of an actual injury of 'serious magnitude' inflicted by one State upon another." *Id.* at 614. It is difficult to understand how the "case or controversy" standard can be satisfied by a statutory interpleader action brought in a district court but not satisfied if the form of the action adheres to the mode of *Texas v. Florida.* In both instances, injury is done to *both* the Estate *and* to California by the assertion of the assertedly invalid Texas death tax claim.[15] And if this Court accepts jurisdiction of the case

[15] As we have already pointed out (*see* pp. 21-22, *supra*), while a statutory interpleader suit is commenced by the stakeholder, once the deposit of the fund is accepted and jurisdiction accepted the controversy becomes one between the claimants. Thus *Lummis v. White* is now, in form and substance, a "controvers[y] between two or more States" (28 U.S.C. §1251(a)) within the exclusive jurisdiction of this Court. Were that case to go forward, if California were to prevail, Texas would lose; conversely, a finding of Texas domicile would mean that California could not collect its claimed tax. California and Texas are, in every sense of the word, adversaries.

and renders a judgment finding a California domicile, California would be afforded a concrete, tangible benefit: an authoritative and enforceable declaration that it, and not Texas, is entitled to impose a domicile-based death tax. and that its lien, and not the lien of Texas, is a valid one.

The contrary view of the concurring opinion appears to rest upon the belief that under " 'accepted doctrines of . . . equity systems of jurisprudence' " (437 U.S. at 601 n.15, quoting from *Texas v. Florida, supra,* 306 U.S. at 405), a *stakeholder* could seek relief from two or more inconsistent claims by interpleading the claimants but that such a *claimant* could not obtain relief by bringing a bill in equity directly against the rival claimant. Justice Stewart's opinion acknowledges, as the Court held in *Texas v. Florida,* that the availability of a particular form of relief under accepted principles of equity jurisprudence is a " 'guide[ ] to decision of cases within the original jurisdiction of the Court.' " *Id.* But contrary to the concurring opinion's assumption, relief by one creditor from the inconsistent claim of another *is* a familiar form of equitable remedy which this court has frequently acknowledged and applied.

Pacific National Bank v. Mixter, 124 U.S. 721 (1888) is an early recognition of the equitable principles later applied in *Texas v. Florida.* In that case, creditors of a national bank obtained a writ of attachment. Two sureties issued a bond for the dissolution of the attachment, which obligated the sureties to the creditors and allowed the attachment to be dissolved. To obtain the bond, the bank deposited with the sureties certain negotiable bonds. Later, the bank failed and a receiver was appointed. The receiver contended that as the bank was a national bank, the original attachment was void; therefore, it argued, the sureties had no liability to the creditors on the surety bond and should return the negotiable bonds to the receiver. The surety, which was faced with the inconsistent assertions of the receiver and the attaching creditors (who, of course, did not concede that their prior attachment was invalid), refused to return the negotiable bonds.

The receiver filed a "bill in equity" (124 U.S. at 723) directly against the attaching creditors as well as against the sureties. In opposition, it was urged that such relief was not available in equity. The Court disagreed:

> "Objection is made to the relief which is sought in equity, because if the attachment bonds are void there is an adequate remedy at law in the suits that may be brought for their enforcement. If the suit in equity had been brought by the sureties to get rid of their obligation, this objection might be good; but such is not its character. The sureties have in their hands assets of the Bank which the Receiver seeks to reduce to his possession, and which they claim the right to hold until they have been fully indemnified against or discharged from liability on the bonds. The Receiver says there is no liability, because the bonds are invalid; and to have that question settled once for all he has brought the persons interested, creditors as well as sureties, before the court in order that it may be conclusively adjudicated between them. Such a suit is clearly cognizable in equity. *The sureties are in a sense stakeholders.* They do not claim the securities unless they are liable on the bonds; and the suit, although not brought by them, is in the nature of an interpleader to save them 'from the vexation of two proceedings on a matter which may be settled in a single suit.' The decree will bind all alike, and if the sureties are held not to be liable it will conclude the creditors from all further proceedings against them on the bonds, and leave them free to surrender the securities to the Receiver. This will not affect the judgments that the creditors have recovered, any further than to limit their operation, so far as the Receiver and the sureties on the attachment bonds are concerned, to the adjudication of the debts as claims entitled to dividends from the proceeds of the assets on the Bank. To that extent, certainly, the court had jurisdiction in each of the suits after the insolvency; but as the attachments were void the judgments are inoperative as a basis of recovery upon the bonds. (*Id.* at 729-30 (emphasis added)).

Had the sureties, whom the Court viewed as in the position of stakeholders, brought the suit, it would have fit the standard interpleader mode. But, as in the present case and in *Texas v. Florida,* the action was brought by one creditor directly against the rival creditors.

Equitable relief against a rival creditor was also allowed in *Salem Trust Co. v. Manufacturers' Finance Co.,* 264 U.S. 182 (1924). There a stakeholder held a fund which had been assigned by its predecessor to two different parties, each of which claimed the fund. The stakeholder did not institute an interpleader suit. Instead, one of the claimant assignees sued the other. This Court allowed the action, held that the joinder of the stakeholder was not required,[16] and determined which of the assignee claimants was entitled to prevail over the other.

More recently, the Court has applied this equitable principle in exercise of its own original jurisdiction. In *Pennsylvania v. New York,* 407 U.S. 206 (1972) and *Texas v. New Jersey,* 379 U.S. 674 (1965), actions in equity were allowed to settle the claims of rival states which each sought to escheat funds held by a stakeholder.

All of these cases afford equitable relief to a creditor whose interests are impaired by the presence of a rival and inconsistent claim of another. While the debtor in such situations is doubtless a stakeholder who could file an interpleader, the creditor need not await such an action but may proceed in equity directly against the other creditor. Accordingly, under "accepted doctrines of . . . equity systems of jurisprudence", relief in the circumstances of this case *is* available, and the case or controversy standard is necessarily satisfied.

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[16] The stakeholder was initially joined. However, jurisdiction was based on diversity of citizenship, and the stakeholder was a citizen of the same state as plaintiff. The Court held that the stakeholder was an "unnecessary and dispensable party" (*id.* at 190) and disregarded its citizenship.

For similar reasons, it is difficult to understand how this controversy could be sufficiently "ripe" for adjudication as a statutory interpleader in a district court but not for adjudication in exercise of this Court's original jurisdiction. In fact, the controversy is ripe for adjudication in either context. It is true, of course, that only Texas has secured a trial court judgment; California has been restrained since the filing of the statutory interpleader action from proceeding in its own courts. But it has long been clear that the mere assertion (or even the theoretical presence) of inconsistent claims, especially claims exceeding the available assets of the debtor, is sufficient to permit a federal court to exercise jurisdiction in an interpleader case. *See, e.g., State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523 (1967); 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, CIVIL §1704 (1972). In *State Farm,* an interpleader suit was brought by an insurer fearing multiple tort judgments in excess of the policy limits, before any of the tort cases had come to trial. *See* 386 U.S. at 525. The Court expressly rejected the suggestion that the action could not be brought until some or all of the tort claims were reduced to judgment. *Id.* at 531-33. No different considerations apply when the suit is brought by one claimant directly against the other. Indeed, the Court's observations in *State Farm* are equally applicable to an action in equity brought by one of the rival claimants:

> "Were an insurance company required to await reduction of claims to judgment, the first claimant to obtain such a judgment or to negotiate a settlement might appropriate all or a disproportionate slice of the fund before his fellow claimants were able to establish their claims. The difficulties such a race to judgment poses for the insurer, *and the unfairness which may result to some claimants,* were among the principal evils the interpleader device was intended to remedy." (*Id.* at 533 (emphasis added)).

The finding in *Texas v. Florida* of a controversy sufficiently ripe for adjudication is also consistent with this Court's original

jurisdiction precedents. For example, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the Court confirmed that its original jurisdiction was properly exercised, and denied a motion to dismiss on the ground that a sufficiently ripe controversy was not presented. In that case, the Court adjudicated inconsistent water rights claims to the North Platte River. The motion to dismiss urged that to date there had been sufficient water for the three claimant states and that, hence, the threat of potential future injury was an insufficient basis for jurisdiction. The Court held that because the three states made *claims of entitlement* which exceeded the projected available water, there was jurisdiction even though no actual shortage of water had ever occurred:

> "[W]here there is not enough water in the river to satisfy the *claims asserted* against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction." (*Id.* at 610 (emphasis added)).

The Court also found the mere existence of untested, unadjudicated rival state claims create an immediate, justiciable controversy in *Pennsylvania v. New York*, 407 U.S. 206 (1972) and *Texas v. New Jersey*, 379 U.S. 674 (1965). In both of those cases, a state seeking to escheat abandoned funds was allowed to invoke this Court's original jurisdiction because of the possibility that other states would also seek to escheat the same funds. This was so even though no rival state had obtained a *judgment* escheating the same funds. It could well have been argued in those cases, as was suggested by Justice Stewart in *California v. Texas*, that no ripe controversy would be presented until at least two states secured final judgments escheating the same property. Indeed, in those cases there was reason to believe that multiple judgments of escheat would *not* occur.[17] Nevertheless, the Court did not take that course.

[17] The possibility of accommodation between the states was far from inconceivable. In *Western Union Telegraph Co. v. Pennsylvania*,

(footnote continued on following page)

Despite the possibility that the potential problem of inconsistent judgments might be avoided by state restraint or deference to a foreign judgment, the Court allowed the exercise of its original jurisdiction merely because one state's claim was rivaled by the "actual, active and persistent" claim (*Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. at 76 (1961)) of another state.

From the foregoing it follows that the suggestion that *Texas v. Florida* be overruled is in reality an argument that this Court should also repudiate the equitable principles applied in *Pacific National Bank v. Mixter, supra,* in *Salem Trust Co. v. Manufacturers' Finance Co., supra,* in *Nebraska v. Wyoming, supra,* in *Pennsylvania v. New York, supra* and in *Texas v. New Jersey, supra.*

Texas v. Florida should not be overruled. While it may result in the occasional imposition upon the limited resources of this Court, unless and until Congress passes a statute which properly creates an alternative forum,[18] this Court's original jurisdiction provides the only appropriate avenue of relief from an intolerable situation. No one can defend the unfairness, to say nothing of the inefficiency, of multiple assertions of domicile being adjudicated in separate state court proceedings. No one can defend the imposition of inheritance taxes by two or more states, each on the basis of domicile, with the total taxes exceeding the assets of the estate.

(footnote continued from previous page)

368 U.S. 71 (1961), the predecessor of the escheat cases discussed above, the Court noted that New York had obtained a judgment escheating certain funds, following which the Pennsylvania court declared that it could not exercise escheat jurisdiction over the funds already taken by New York. *Id.* at 77. Thus under Pennsylvania law, multiple judgments of escheat could not occur. If the other states took the same view, there would never have been a situation in which the stakeholder was subjected to multiple liability. Nevertheless, the Court opened its doors to suits under its original jurisdiction despite the possibility that the controversy might be resolved short of inconsistent judgments of escheat.

[18] Congress could, of course, provide for an interpleader remedy in a district court. Such a proceeding would have to be an express exception to this Court's original jurisdiction under 28 U.S.C.

(footnote continued on following page)

For the reasons discussed above (*see* pp. 17-26, *supra*), an action under the present Federal Interpleader Act does not provide an appropriate solution. By its own terms, subject matter jurisdiction will be lacking in cases of this kind. But even if that were not so, the Act is an unsuitable remedy for resolving rival State death tax claims. As presently worded, venue must be laid in one or the other of the claimant states—and the choice of which state will be at the option of the stakeholder. Thus the tax claim of one state will be determined by jurors who are citizens of the rival claimant state. Moreover, once such an interpleader proceeding is commenced it becomes, by definition, a "controvers[y] between two or more States" which, under Section 1251(a), *only* this Court has jurisdiction to hear.

Of course, if every state were to adopt the Uniform Act on Interstate Arbitration of Death Taxes or otherwise consented to binding arbitration, the problem could be resolved in another way. California has adopted the Uniform Act. *See* p. 14, *supra*. The problem presented by this case is fortunately rare, doubtless because many states have adopted arbitration procedures such as those presented by the Uniform Act. *See California v. Texas, supra,* 437 U.S. at 615 n.15 (Stewart, J.). Unfortunately, Texas has not seen fit to do so. Were this Court to overrule *Texas v. Florida,* the resulting absence of any remedy against inconsistent state domicile claims would reward those states, such as Texas, who have abjured any participation in a fair process for the unitary resolution of these conflicting claims. Conversely, adherence to the rule of *Texas v. Florida* would encourage other states voluntarily to adopt such procedures.

For these reasons, we believe that the exercise of original jurisdiction to resolve this controversy is required. Under the

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§ 1251(a). *See* Part II(B), *supra*. By drafting a statute expressly designed for the purpose of resolving death tax disputes involving several states, the jurisdictional problems discussed in Part II(A), *supra*, could be avoided. Finally, Congress could provide for a neutral forum. Merely to recite these features of an appropriate new statute is to underscore the need for the exercise of original jurisdiction in the absence of one.

Constitution, and the statutes of the United States as they presently read, this Court is not only the appropriate forum, but the only possible one, for the proper determination of the rights of California and Texas.

CONCLUSION

The motion for leave to file complaint should be granted.

March 12, 1981.

Respectfully,

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No. , Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA,
Plaintiff,

VS.

STATE OF TEXAS, *et al.*,
Defendants.

COMPLAINT

Plaintiff, appearing through its duly authorized representative, Kenneth Cory, Controller of the State of California, alleges:

I.
JURISDICTION

1. This is a controversy between two states within the Court's original and exclusive jurisdiction under Article III, Section 2 of the Constitution and 28 U.S.C. § 1251(a). The

controversy exists because the State of California ("California") and the State of Texas ("Texas") each seek in the courts of their respective states to impose death taxes on the estate of Howard Robard Hughes, Jr. ("the Estate"), based upon assertions of California and Texas domicile. Each state claims a lien on the assets of the estate. Should both states be successful in their respective courts, the resulting judgments for taxes and interest, plus the federal estate tax, the expenses of administration and other lawful liabilities of the Estate will exceed the available assets of the Estate. Further, the assertion of liens by each state is inconsistent with the other state's asserted lien. As neither California nor Texas has appeared or will appear voluntarily in each other's courts and because this Court has exclusive jurisdiction over controversies between states, this Court offers the only available (and in any event the only appropriate) forum to achieve a resolution of the domicile issue which will be binding on all parties and ensure that the state to which the tax is properly due will be able to collect it.

2. In 1978, this Court denied a motion for leave to file a similar complaint. *California v. Texas*, 437 U.S. 601 (1978). Several factors asserted in opposition to the exercise of original jurisdiction, and which may well have impelled the Court to deny the motion, are no longer present:

(a) The Estate and California had entered into a provisional settlement agreement. In that agreement, the Estate agreed to pay a 16% tax to California if this Court entertained California's suit against Texas and found that Hughes was not domiciled in Texas. Texas protested that this settlement was collusive, that it amounted to a "sale" of access to this Court's original jurisdiction, that California lacked clean hands and that there was no genuine case or controversy between California and Texas. That settlement agreement has now expired by its own terms, and the relationship between California and the Estate is wholly adversary.

(b) In 1978, there was pending in various state courts a claim by the Howard Hughes Medical Institute ("HHMI") that a "lost will" of Hughes bequeathed his entire estate to a charitable foundation. Noah Dietrich's claim that the so-called "Mormon will" (which also purported to make substantial charitable bequests) was a valid testamentary instrument was also pending at that time. Texas urged in opposition to the prior motion for leave to file a complaint that if the HHMI lost will claim were sustained, the death tax controversy would be moot because the charitable bequest would foreclose any state claim for inheritance tax. It was also urged that if the Mormon will were found to be genuine, the death tax controversy would be eliminated because the resulting charitable bequests would so reduce the total taxes that the available assets of the Estate would not be exceeded by the total tax claims. Since this Court's prior order, these issues have now been adjudicated. The Mormon will was determined to be inauthentic. No appeal was taken and that judgment is now final. The HHMI lost will claim was rejected by a Texas probate court and by a final judgment of the Nevada Supreme Court.

(c) Four Justices of this Court previously suggested that the conflicting claim of California and Texas could be resolved in a United States District Court under the Federal Interpleader Act. Their concurring opinions in *California v. Texas, supra*, concluded that the Eleventh Amendment no longer barred such an action; they did not, however, discuss issues of subject matter jurisdiction and venue under the Interpleader Act. In light of subsequent events, those issues have proven to be formidable obstacles to the use of the Interpleader Act as an alternative means of resolving multistate death tax disputes. As more fully explained in paragraph 24 hereafter, a statutory interpleader action in a district court is not an available and appropriate alternative forum for the resolution of this controversy.

II.
PARTIES

3. Plaintiff California and Defendant Texas are both states of the United States of America. Each state maintains, and has maintained at all relevant times herein, a system of inheritance taxation whereby statutory liens on the right of succession are imposed on real and tangible personal property located within its borders and the intangible personalty, wherever situated, of persons domiciled within each state. The responsible authorities in each state are claiming, in good faith, that Hughes was domiciled therein at the time of his death and have taken steps to impose a tax on all the assets of the Estate within their taxing jurisdiction, including the intangible assets which constitute the overwhelming majority of the Estate's assets. In each state, the personal representative of the Estate is contesting the state's claim, asserting that Hughes died domiciled in Nevada, the only state in the nation without death taxes. Both California and Texas compute their inheritance taxes on the basis of the fair market value of the estate's assets at the time of the decedent's death and both maintain a "pick-up tax" to ensure that the state at least receives the maximum amount allowable as a federal tax credit for state death taxes paid.

4. Defendant Mark White is the Attorney General of Texas. Defendant Bob Bullock is the Comptroller of Public Accounts of Texas. Each of these officials is charged by law with the duty of enforcing the tax laws of Texas.

5. Defendant William R. Lummis has been appointed Temporary Administrator of the Estate by Probate Court No. 2, Harris County, Texas. Defendant Lummis has also been appointed Ancillary Administrator of the Estate by the probate court of Delaware, Provisional Administrator of the Estate by the probate court of Louisiana and Co-Special Administrator of the Estate by the Eighth Judicial District Court of the State of Nevada, County of Clark.

6. Defendant First National Bank of Nevada, a national banking association, has been appointed Co-Special Administrator of the Estate (with defendant Lummis) by the Eighth Judicial District Court of the State of Nevada, County of Clark. Defendant Richard Gano has been appointed Executor of the Estate by the Superior Court of the State of California, County of Los Angeles.

7. Defendants William Rice Lummis, Richard Gano, Howard Hughes Gano, Doris Gano Wallace, Annette Gano Gragg, Janet Houstoun Davis, Aileen Lummis Russell, Annette Gano Lummis Neff, Frederick Rice Lummis, and Sarah Houstoun Lindsey are first cousins of decedent Hughes. They claim that Hughes died intestate and that they are entitled to share in the Estate. Defendant Southern National Bank of Houston is the Independent Executor of the Estate of James Patrick Houstoun, Jr., first cousin of Hughes whom Hughes predeceased. Under the law of Texas, the Estate of James Patrick Houstoun, Jr., may be entitled to share in the Estate. Defendant Mrs. William Kent Gano is the Executrix of the Estate of William Kent Gano, first cousin of Hughes whom Hughes predeceased. Under the law of Texas, the Estate of William Kent Gano may be entitled to share in the Estate.

8. Defendants John McIntosh Houstoun, Margot Fleming Houstoun, James Wilkin Houstoun, Richard Alexander Houstoun, Barbara Cameron, Elspeth DePould and Agnes Roberts are first cousins, once removed, of Hughes. They claim that Hughes died intestate and that they are entitled to share in the Estate.

9. Defendant Avis Hughes McIntyre claims to be an equitably adopted first cousin of Hughes. Defendant Norton Bond is the executor of the Estate of Rush Hughes, who is claimed to be an equitably adopted first counsin of Hughes. They claim that Hughes died intestate and that they are entitled to share in the Estate.

10. Defendant George Neff is the Executor of the Estate of Annette Gano Lummis, the maternal aunt of Hughes. He claims that Hughes died intestate and that the estate of Annette Gano Lummis is entitled to share in the assets of the Estate.

11. An agreement between the parties named in paragraphs 7-10 ("the heirs") has been entered whereby the heirs agree as to the distribution of the assets of the Estate without regard to the laws of intestate succession of the various jurisdictions in which Hughes may have been domiciled. Were it not for the agreement, if Hughes dies intestate and a domiciliary of California, then under the law of California, the Estate of Annette Gano Lummis would inherit the entire Estate. As required by California law, the California inheritance tax has been computed without regard to the agreement, and Annette Gano Lummis will be liable for the entire California tax due (except as to certain real property validly disclaimed by her). However, the other heirs who are parties to the agreement will, to the extent that they inherit property pursuant to said agreement, be jointly and severally liable for their proportionate share of the California tax relating to the assets so acquired by them.

12. Defendant Summa Corporation is a Delaware corporation, the stock of which was solely owned by decedent at the time of his death. The Summa shares constitute a principal asset of the Estate. Summa has instituted an interpleader action in the Delaware courts between the various claimants to the Estate, seeking cancellation of decedent's shares and a judicial determination of their ownership.

III.
FACTUAL BACKGROUND

13. Howard Robard Hughes, Jr., was born in Texas in 1905. He resided in Texas until 1926, when he became a California domiciliary. He resided in California continuously until 1966 and acquired extensive business holdings and relationships there. Hughes filed non-resident income tax returns in California but paid tax at the resident rate (i.e., on all his income). His only known extended absence from California during this forty-year period was in 1953-54, when he temporarily resided in Nevada. After leaving California in 1966, Hughes travelled successively to Boston, Las Vegas, the Bahamas, Nicaragua, Canada, Florida, London, the Bahamas and

Mexico, living in hotel rooms in the various locales but never acquiring another domicile. During this period, decedent retained his personal and business ties to California and the "nerve center" of his business operations remained there. Hughes died on April 5, 1976, in an airplane en route to Houston, Texas.

IV.
PRIOR PROCEEDINGS

14. On April 14, 1976, nine days after Hughes' death, probate proceedings were opened by representatives of the Estate in the courts of Texas, Nevada and California. Annette Gano Lummis and William Lummis were appointed Co-Temporary Administrators of the Estate by Probate Court No. 2 of Harris County, Texas, while the nominees of Mrs. Lummis, First National Bank of Nevada and Richard C. Gano, were appointed Special Administrators of the Estate by the probate courts of Nevada and California, respectively. Subsequently, William R. Lummis was added as a Co-Special Administrator in the Nevada proceedings. Mrs. Lummis has since died.

15. On June 10, 1976, the State of Texas filed an appearance in the Texas probate proceedings, contending, *inter alia*, that Hughes was a Texas domiciliary at the time of his death and asserting its statutory inheritance tax lien against all assets within the Texas jurisdiction, including intangibles. The Texas Co-Temporary Administrators of the estate resisted Texas' claims and asserted that Hughes acquired first a California and then a Nevada domicile. After a jury trial, a verdict was returned finding that Hughes was a domiciliary of Texas. Determination of the amount of tax was left to a separate proceeding. An appeal has been taken by the Estate, but appellate proceedings have been stayed as a result of the federal interpleader suit described below. California is not a party to and therefore will not be bound by any judgment entered in the Texas proceedings.

16. California Inheritance Tax proceedings began with the appointment by the Superior Court, Los Angeles County, of an Inheritance Tax Referee to inventory and appraise the estate under California Probate Code § 605 and California Revenue and Taxation Code §14501 *et seq.*, On August 24, 1977, the California Special Administrator submitted the California Inheritance Tax Declaration to the Referee. The Special Administrator's Declaration asserted that decedent was a Nevada domiciliary and reported only tangible personal and real property located in California. The Inheritance Tax Referee has informed the Controller that he intends to file a report stating that there is now due an inheritance tax on the entire estate, less the real and tangible personal property located outside of California, on the basis that decedent was a California domiciliary. Notice of the filing of the report will be sent as required by law to all known persons potentially liable for tax. Objections to the Report based *inter alia*, on the claim of Nevada domicile, will be filed by the Estate. These steps have not been taken to date because California has been enjoined in the federal interpleader suit described below from taking any steps in its state courts to assert a claim for death taxes based on domicile. The question of decedent's domicile is therefore an issue in the California proceedings.

17. The State of Nevada imposes no inheritance tax. In the Nevada proceedings, final judgments have been rendered determining that (a) a holographic will (the so-called "Mormon Will") which was offered for probate, was not genuine; and (b) the claim of the Howard Hughes Medical Institute, a nonprofit corporation, that pursuant to an alleged lost will all the assets of the estate were devised to it was without basis in fact.

18. On May 4, 1976, Summa Corporation instituted an interpleader action in the Chancery Court of New Castle County, Delaware, seeking cancellation of its outstanding shares in decedent's name and direction from the court as to whom the shares should be reissued. Delaware jurisdiction was

asserted on the basis of 8 Delaware Code §169, which provides that the situs of shares in a Delaware corporation is Delaware, regardless of where the physical certificates representing the shares are located. On the date the complaint was filed, the Delaware Chancery Court entered an order requiring Summa to recognize William Lummis, contemporaneously appointed as ancillary administrator of the estate in Delaware, as its sole shareholder *pendente lite*. The California Controller is not a party to the Delaware suit and will not be bound by any judgment entered therein.

19. At present, therefore, the issue of decedent's domicile is pending in the courts of California and Texas, with the Estate, through the personal representative in each state, asserting Nevada domicile in each jurisdiction. Neither Texas nor California is, or will become, a party to the proceedings in the other's courts, with the result that neither will be bound by an adverse determination in the other's forum. Under established principles of law, the courts of each state may render contradictory findings of domicile and those conflicting determinations would not be subject to review by this Court.

20. In 1978, this Court denied California's motion for leave to file a complaint against the State of Texas. *California v. Texas,* 437 U.S. 601 (1978). Thereafter, the Estate filed an action in the United States District Court for the Western District of Texas, purporting to invoke the jurisdiction conferred by the Federal Interpleader Act. The taxing officials of California and Texas were named as Defendants. The District Court enjoined California and Texas from taking any step to collect a domicile based death tax pending further proceedings. Following extensive briefing and argument, the District Court (a) denied California's motion to add the acknowledged heirs of Howard Hughes as parties; and (b) denied California's action to change venue to a district court other than one sitting within one of the two claimant states. However, the District Court subsequently determined that it lacked subject matter jurisdiction under the Interpleader Act and dismissed the

complaint. 491 F. Supp. 5 (W.D. Tex. 1979). The Court of Appeals affirmed the further rulings, but held that the District Court did have jurisdiction. 629 F.2d 337 (5th Cir. 1980). A timely petition for rehearing *en banc* was denied on December 12, 1980.

21. The Court of Appeals found statutory interpleader jurisdiction under 28 U.S.C. §1335. That section requires that there be at least two "claimants" who are "citizens" of diverse states. The District Court had held, and the Court of Appeals did not question, that neither California nor Texas (nor their respective taxing officials) are "citizens of a state" under the Interpleader Act. The Court of Appeals nevertheless held that the statutory requirement of two claimants of diverse citizenship was satisfied. It held that (a) the Plaintiff administrator, a citizen of Texas, was also an interested "claimant" whose citizenship could be considered for jurisdictional purposes; and (b) under California law, a fraction of the state death tax is paid to the county treasurer as a commission for collecting the death tax and remitting it to the State Controller, with the result that the Los Angeles County Treasurer is a "claimant" and a "citizen" of California. On January 1, 1981, after the time for filing a petition for rehearing had expired, an extensive revision to the California inheritance tax law became effective. This amendment eliminated the participation of the County Treasurer in the collection of death taxes; such taxes are now paid directly to the State, and the county receives no portion of them. As a result, the premise of the Court of Appeals that the Los Angeles County Treasurer is a "claimant" to any part of the Hughes estate is now clearly incorrect. A motion for leave to file a petition for rehearing out of time was filed with the Court of Appeals for the purpose of bringing this development to its attention. The motion was denied, without comment, on January 23, 1981. Accordingly, the effect of this statutory revision on the District Court's jurisdiction has not been resolved by the Court of Appeals.

V.
CONTROVERSY BETWEEN STATES

22. The effective rate of California tax applicable to the Estate is 24% on all amounts in excess of $400,000. Similarly, the effective rate of Texas tax on amounts exceeding $1,000,000 is approximately 16%. The federal estate tax on amounts in excess of $10,000,000 is 77%, less a credit of 16% for state death taxes. The combined marginal tax rate is therefore 101%. Interest on unpaid death taxes in California accrues at the rate of 12%. Interest on the Texas tax accrues at 6%. Interest on the federal tax accrues at a variable rate which is presently 12%. Some expenses actually incurred by the estate are not deductible under the applicable tax laws. As a consequence of these factors, the total federal and state estate and inheritance taxes and interest claimed substantially exceed the available assets of the estate.

23. The death tax claims of California and Texas are each based upon an assertion that Hughes was a domiciliary at the date of his death. The laws of each state utilize the identical legal definition of "domicile." Under each state's law, there can be but one domicile at any time. The claim of Texas is therefore wholly inconsistent with the claim of California.

24. Texas claims a lien on all intangible assets of the Estate to secure its domicile-based death tax claim. California asserts an identical lien. Because Hughes was a domiciliary of California and not of Texas, the Texas lien is invalid, and does not constitute a lien superior to the lien asserted by California.

25. For the reasons stated in paragraph 21 above, no lower federal court has subject-matter jurisdiction over this controversy under the Federal Interpleader Act. Moreover, once an interpleader suit is brought by an estate against two or more states, and the issues are joined, the suit becomes a "controversy between two or more states" (28 U.S.C. §1251(a)) within the original and exclusive jurisdiction of this Court.

Were the statutory interpleader suit commenced by the Estate in the Western District of Texas allowed to proceed, it would represent an attempt to adjudicate a controversy between California and Texas as to which state is entitled to tax the Estate on the basis of domicile. Such an adjudication is beyond the jurisdiction of the District Court. Even if this were not so, the Federal Interpleader Act, as presently written, does not offer an appropriate alternative means of resolving inconsistent death tax claims of two or more states. Under the Act's venue provisions, such suits must be brought in one of the claimant states, and under 28 U.S.C. §1404(a), the action can only be transferred to a district where the suit might have been brought in the first instance. In all probability, a jury trial is required if any party requests it. Thus the death tax claim of a sovereign state will be determined by persons who are citizens of the rival claimant state. This procedure is wholly inappropriate for the resolution of conflicting death tax claims of states. For all of these reasons, a statutory interpleader action in a district court is not an available and appropriate alternative remedy.

26. The domicile claim of Texas is without factual basis. If unrestrained, Texas will endeavor to perfect its trial court judgment finding a Texas domicile and to enforce that judgment and the lien on intangible assets which Texas has to secure payment of Texas death taxes. It is highly probable that this will occur before California can obtain a final judgment in its own courts on its death tax claim. The overwhelming majority of the Estate's tangible assets are located outside of California, and the Estate intends to administer the tangible assets in one or more states other than California. As a result, payment of the death tax claim of Texas will deprive California of its property right in the lien on Estate assets, and will prevent California from collecting the entire death tax and interest due to it. Moreover, the mere existence of the inconsistent Texas claim—and the lack of any alternative forum in which to obtain a determination of domicile binding on both states—will substantially impair the opportunity California might otherwise have to negotiate a fair and reasonable compromise of its tax

claim against the Estate. Accordingly, California will be irreparably injured if Texas is permitted to impose and collect an inheritance tax based on a determination by a Texas court of a Texas domicile.

27. This suit is being brought on behalf of the State of California to protect its statutory inheritance tax lien on the Estate and to collect any lawfully imposed tax thereon, and not on behalf of the Estate or any other person or entity.

WHEREFORE, Plaintiff prays that:

(a) The Court grant leave to file the instant complaint and issue its summons to the Defendants named herein;

(b) The Court refer the matter to a Special Master;

(c) The Court declare that California was the domicile of Hughes on the date of his death for purposes of death taxation and that the statutory lien on intangible assets of the Estate claimed by Texas is invalid; and

(d) The Court grant such other and further relief as may be just and proper.

DATED: March 12, 1981.

Respectfully,

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No. 88, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF TEXAS, *et al.*,
Defendants.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

Defendant William R. Lummis (Texas Administrator of the Estate of Howard R. Hughes) ("Lummis"), a citizen of Nevada, files this his Brief in Opposition to Motion for Leave to File Complaint. Lummis requests that the Court defer ruling on the Motion until it has considered the companion Petition for Certiorari which was filed simultaneously by the California taxing officials and which has been opposed by Lummis and the Texas taxing officials, Respondents in that action. (No. 80-1556)

No party to the certiorari proceeding now contends that Lummis, as the representative of the Hughes Estate, should be denied relief against multiple death taxation by California and Texas. The present conflict is whether relief shall be by the pending statutory interpleader proceeding begun by Lummis in the district court and now the subject of the California taxing officials' Petition for Certiorari; or by an original action which California now seeks to institute.

This Court denied a previous Motion by California For Leave to File a Bill of Complaint. *California v. Texas,* 437 U.S. 601 (1978). Four members of the Court suggested, in concurring opinions, that the proper way to resolve the dilemma of the Hughes Estate was to file an interpleader action under 28 U.S.C. § 1335, interpleading all those who because of competing domicile claims are asserting entitlement to the intangible assets of the Hughes Estate. *Id.* at 601-2; 608, n.10; 615. Lummis promptly filed such an action. On October 27, 1980, the Court of Appeals for the Fifth Circuit held that the district court has subject matter jurisdiction in the interpleader action. *Lummis v. White,* 629 F.2d 397 (5th Cir. 1980). That judgment is the subject of the pending certiorari proceeding.

Thus, there already exists an adequate remedy for resolving the threat of multiple state death taxation that confronts the Hughes Estate. If this Court denies certiorari as urged by Lummis and the Texas taxing officials, the statutory interpleader action will go forward, and the convenience, efficiency and justice provided by that

remedy will render unnecessary the exercise of this Court's original jurisdiction.

Respectfully submitted,

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***

BRIEF IN OPPOSITION

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STATEMENT

The State of California ("California"), the once-spurned suitor of this Court's original jurisdiction *(see California v. Texas*, 437 U.S. 601 (1978)), arrives again at the Court's door in a second attempt to gain the favor of such jurisdiction. This attempt should be rebuffed for many of the same reasons as it was in 1978.

California's action arises as a result of the death of Howard Robard Hughes, Jr., on April 5, 1976, and the efforts of California and the State of Texas ("Texas") to impose domicile-based death taxes on the Hughes estate.

Mr. Hughes was born in Houston, Texas, on December 24, 1905. His father was an inventor and manufacturer. His mother, a member of a prominent family that settled in Texas in 1856, died in 1922. When his father died in 1924, a Houston court removed the disability of minority from the nineteen-year-old Hughes and allowed him to take control of Hughes Tool Company, a Houston corporation that manufactured oil well equipment.

In June of 1925 Mr. Hughes married Ella Botts Rice, a member of the distinguished Houston family for whom Rice University is named. Mr. Hughes developed interests in filmmaking and aviation and began making trips to Los Angeles, California to pursue those avocations. By 1929, when Mrs. Hughes obtained a divorce in Houston, Mr. Hughes had begun to spend a considerable amount of his time in southern California. For the next two decades he traveled extensively, spending much of his time making cross-country test flights. While Mr. Hughes based his aviation and movie activities in California, he spent much of his time traveling during this period, predominately on the East Coast.

In 1940 Mr. Hughes registered with a Houston draft board and was given a deferment to continue his

airplane and armament manufacturing in Texas and California during World War II. In sworn testimony in 1947 before a Senate committee investigating claims of profiteering on wartime contracts, he gave his residence as Houston, Texas and stated that his company was headquartered there. He expressed disdain at the attempt to impugn his integrity, stating, "I believe I have the reputation in that respect which most Texans consider important. That is to say, if I may use a corny phrase, I believe people consider my word to be my bond." Testifying in a state court civil trial in California in 1952, Mr. Hughes stated that although he was then staying at the Beverly Hills Hotel, his domicile was Houston, Texas.

From 1950 until 1966 Mr. Hughes spent most of his time in California, although he was also in Nevada, Florida, Canada and the Bahamas for significant periods of time. The majority of his time in California during this period was spent at the Beverly Hills Hotel, where he rented rooms on a day-to-day basis.

From 1966 until his death, Mr. Hughes stayed in hotels in Boston, Las Vegas, the Bahamas, Nicaragua, Vancouver, London and Acapulco. Throughout his travels--indeed, throughout his entire life--Hughes listed Houston, Texas as his residence on his passports, on all of his federal income tax returns, and on all state income tax returns he was required to file. On April 5, 1976, Mr. Hughes was placed on a private jet in Acapulco, Mexico, bound for Methodist Hospital in Houston, Texas. He died en route shortly after the plane passed over Brownsville, Texas. Mr. Hughes was buried next to his parents in Houston's Glenwood Cemetery. He had maintained his family burial plot since his father's death in 1924 but did not finally purchase a perpetuity deed thereon until 1973, soon after he had undergone major surgery in London for a hip injury that was to keep him bedridden for the remaining three years of his life.

On April 14, 1976, probate proceedings were begun in California, Texas and Nevada. A purported will of Mr. Hughes, dated March 19, 1968 (the "Mormon" will), containing substantial bequests to several charitable organizations (including the University of Texas and Rice University), surfaced in late April of 1976 and was offered for probate in California, Nevada and Texas. The Howard Hughes Medical Institute ("HHMI"), a non-profit corporation, appeared and asserted that Mr. Hughes had executed and never revoked a valid will (the "lost" will) leaving his entire estate to HHMI.

The Texas Attorney General entered an appearance for the State of Texas in the Houston probate proceeding on June 10, 1976, asking the Court to determine the validity of any purported will of Mr. Hughes and to declare Texas his domicile at the time of death. After extensive discovery a trial of the issues of domicile and the validity of the Mormon will was held in Houston beginning November 14, 1977. After three months of trial, the jury found that Mr. Hughes was domiciled in Texas at death and that the Mormon will was invalid. Judgment to that effect was subsequently entered.

Final judgment has also been rendered in Nevada finding that the Mormon will is invalid. Final judgment has been rendered against HHMI in Nevada on the lost will; the Houston probate court recently entered a summary judgment against HHMI on the lost will, which judgment will be appealed.

Proceedings to determine heirship are continuing in the Houston probate court. Over 400 people have alleged that they are the rightful heirs to the Hughes fortune. Among these are several who assert that they are Hughes' widow, and others who contend that they are his natural children.

Efforts to valuate the Hughes estate are also being

made by taxing officials. The Internal Revenue Service has valued the gross estate at $468,085,903. The Hughes estate is contesting this valuation in United States Tax Court. The California inheritance tax referee has valued the gross estate at $1,106,345,561. Although the Texas valuation has not been released to the public, it more closely approximates the Internal Revenue Service valuation than the California valuation.

On the Friday before the Houston domicile trial began, California first attempted to invoke this Court's original jurisdiction by filing its first Motion for Leave to File Complaint. On the first day of the Houston trial, California filed its Application for Temporary Restraining Order and/or Preliminary Injunction with this Court, attempting to stop the Houston trial. This Court denied California's application.

On June 22, 1978, this Court unanimously denied California's Motion for Leave to File Complaint. *California v. Texas, supra.* In response to the concurring opinions accompanying that decision, the Hughes estate filed an interpleader action in the United States District Court for the Western District of Texas, joining as defendants the taxing officials of Texas and California. That court has restrained all parties from pursuing Hughes domicile litigation in other forums.

In the interpleader case, Texas filed a motion to dismiss. California first filed two companion motions, one to add as defendants twenty-two of the over 400 alleged heirs of Mr. Hughes, and the other to change venue either to Denver, Colorado or to Los Angeles, California. The district court denied these motions, and California then filed a motion to dismiss. The motions to dismiss were granted, and the Hughes estate took an appeal of this latter ruling to the Fifth Circuit Court of Appeals. California cross-appealed the district court's rulings on its companion motions to add parties and change venue.

The Fifth Circuit reversed the district court decision dismissing the case, affirmed the district court's orders as to additional parties and venue, and remanded the case for trial. California has filed a petition for certiorari. (No. 80-1556; hereafter "Pet. for Cert.").

Texas and California are not on a collision course. Although both assert a statutory lien on the intangible assets of the Hughes estate, using California's own valuation, there are ample assets to satisfy each statutory lien. Part I (A), *infra.* In fact, contrary to California's representation, the effective combined tax rate of California, Texas and the United States is 99.7%. Thus, no statutory lien will be left unsatisfied. *Id.* Even these tax rates are contingent upon a finding in the heirship proceedings that Mr. Hughes did not leave a widow or children, a finding that has yet to be made. Nor does California take into account that in the over five years since Mr. Hughes' death, the Hughes estate has increased in value, thereby placing even more assets within the reach of the taxing authorities.

In short, two sovereign states are not at each other's throat. Both states may constitutionally impose death taxes on the estate (Part I(B), *infra*), and it appears that there will be sufficient funds to pay Texas, California and the United States any inheritance taxes which are due. If not, an adequate remedy for this most unusual case lies in the interpleader case filed by the Hughes estate. Part II, *infra.*

I.

CALIFORNIA'S COMPLAINT PRESENTS NO CONTROVERSY BETWEEN STATES WITHIN THIS COURT'S ORIGINAL JURISDICTION

California seeks to invoke this Court's original jurisdiction on the authority of *Texas v. Florida,* 306 U.S. 398 (1939). Although a dispute does now exist over

the domicile of Howard Hughes, the circumstances underlying that dispute are critically different from those which prompted this Court to determine the domicile of Colonel Green more than forty years ago. As a result, California cannot show that it will suffer injury at the hands of Texas, thus precluding an exercise of original jurisdiction under *Texas v. Florida, supra.* Part I(A), *infra.* And, as set forth in Part I(B), *infra, Texas v. Florida* should be overruled because the mere possibility that a state will obtain a tax judgment that may be partially uncollectible if a sister state collects a similar judgment does not create a controversy between states within this Court's original jurisdiction.

A. California Cannot Demonstrate The Requisite Harm to Invoke Jurisdiction Under *Texas v. Florida.*

A state seeking to invoke this Court's original jurisdiction in an effort to control the conduct of a sister state must sustain a much greater burden than an ordinary litigant, both in demonstrating that jurisdiction exists and in showing facts that warrant the exercise of that jurisdiction. *North Dakota v. Minnesota,* 263 U.S. 365 (1923). "Leave [to file a complaint] will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent." *Alabama v. Arizona,* 291 U.S. 286, 292 (1934). "Before the court will intervene the case must be of serious magnitude and fully and clearly proved." *Colorado v. Kansas,* 320 U.S. 383, 393 (1943). *See New York v. New Jersey,* 256 U.S. 296, 309 (1921); *Connecticut v. Massachusetts,* 282 U.S. 660, 669 (1931); *Washington v. Oregon,* 297 U.S. 517 (1936).

The linchpin of jurisdiction in *Texas v. Florida, supra,* as even California now admits (Pet. for Cert. 14 n. 14),

was a demonstration that *if*[1] each competing state obtained a domicile judgment the resulting state death taxes, combined with the federal estate tax, *would* exceed the value of the estate. *California v. Texas, supra,* 437 U.S. at 609-612 (Stewart, J., concurring). In fact, leave to file a complaint was initially denied until figures were included showing that the total of all death tax claims exceeded the value of Colonel Green's estate. *See Texas v. New York,* 300 U.S. 642 (1937); Bill of Complaint in No. 11, Original (1937). Those figures could be accurately calculated, and the insufficiency of Colonel Green's estate clearly demonstrated, because his estate was primarily comprised of stocks and bonds, "[p]ractically all of [which] had a readily ascertainable market value as of the date of decedent's death." Bill of Complaint at 13, No. 11, Original (1937).

This jurisdictional prerequisite of showing harm, which must be "fully and clearly proved" (*Colorado v. Kansas, supra,* 320 U.S. at 393) by "clear and convincing evidence" (*New York v. New Jersey, supra,* 256 U.S. at 309), has been conspicuously side-stepped in California's proposed complaint. When California sought leave to file its prior complaint, and was contractually linked with the Hughes estate, it used the estate's valuation submitted on its federal estate tax return in an attempt to meet the required showing that the estate could not satisfy all three tax claims. *See* App. "A", Motion for Leave, No. 76, Original (1977). But California's current Motion for Leave to File Complaint contains no similar effort to show these jurisdictional figures and merely asserts that "*it is likely* that California will be ir-

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[1]As further developed in Part I(B), *infra,* while the mere possibility of different domicile determinations by the two states may be a sufficient threat to an estate to establish interpleader jurisdiction under 28 U.S.C. §1335, it falls woefully short of the "clear and convincing evidence" that one state is in imminent peril of grave injury at the hands of a sister state, which must be shown to warrant exercise of this Court's original jurisdiction. *New York v. New Jersey, supra,* 256 U.S. at 309.

reparably injured by being unable to satisfy its judgment for taxes and interest." Motion for Leave 7 (emphasis added). The reasons for this omission are undoubtedly twofold. First, the nature of the assets of the Hughes estate is such that its value cannot be calculated with mathematical precision. And, second, under the very valuation which California asks this Court to adopt for other purposes (*see* Pet. for Cert. 25), the Hughes estate can fully satisfy all potential death tax claims that have been asserted against it.

Unlike Colonel Green, Howard Hughes died as the sole owner of a highly-diversified conglomerate, Summa Corporation, whose assets included, *inter alia*, hotels, casinos, raw land, mining claims, and a regional airline. Other activities of Summa's divisions ranged from helicopter manufacturing and television broadcasting to ranching, ocean mining and aircraft servicing. Since the value of this wide mix of corporate assets is not easily determinable, the likelihood that the three potential taxing authorities would reach significantly different valuations of the Hughes estate has eventuated. Because the effective tax rates of the combined claims total approximately 99.7%[2], even relatively small differences in valuation make it impossible for California to show that the estate cannot satisfy all three claims.

California takes pains to note that "[m]uch has happened since 1978..." to remove some of the uncertainties which may have caused this Court to deny its earlier complaint (Motion for Leave 14-15), but completely ignores the most vital developments which have occurred since 1978 for purposes of this case: (1) the conclusion of the Internal Revenue Service audit upon which the federal estate tax claim is based, and (2) the valuation of the Hughes estate by the California inheritance tax referee. These figures demonstrate that under California's own valuation of the Hughes estate, ample assets

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[2]See note 5, *infra*.

exist to satisfy the tax claims of the United States, California and Texas--if indeed California should be able to obtain a judgment in its own courts.

For federal estate tax purposes, the Internal Revenue Service has valued the total gross estate at $468,085,903 and the taxable estate at $398,466,699. The maximum federal estate tax claim is therefore $241,976,486 ([6,088,200 + 77% of 388,466,699] less the maximum federal credit for state death taxes of [1,082,800 + 16% of 388,426,699]).[3] *See* 26 U.S.C. §§2001, 2011 (1976). The effective rate of that federal estate tax claim is roughly 60.7% of the *taxable* estate. In a sworn affidavit filed by counsel for the Controller of California in the federal district court interpleader action, the California inheritance tax referee valued the entire Hughes estate at $1,106,345,516, fixed the clear market value of the property in the Hughes estate subject to California inheritance tax at $1,039,712,436, and set forth the total tax due to California as $249,497,419. *See* Appendix "A", *infra.* A table of these figures clearly paints California's position:

(See table on following page)

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[3]The estate and the Internal Revenue Service are now litigating the issue of the value of the estate in U.S. Tax Court. As a result of that litigation, the actual federal estate tax imposed may be less than the figure above.

	Valuation of Gross Estate	Taxable Estate	Approximate Effective Rate of Tax	Maximum Tax Claim
U. S.	468,085,903	398,466,699	60.7%	$ 241,976,486
CALIF	1,106,345,516	1,039,712,436	24.0%	249,497,419
TEXAS[4]	1,106,345,516	1,039,712,436	15.0%[5]	155,956,865
		Totals	99.7%	*$ 647,430,770*

California valuation of the *taxable* estate	$ 1,039,712,436
Total tax claims	- 647,430,770
Surplus[6]	$ 392,281,666

[4]Texas has not yet released its valuation of the Hughes estate. Although Texas' valuation will be closer to that of the Internal Revenue Service than to California's, to illustrate how amply all tax claims fall within California's own valuation of the estate, Texas' maximum tax claim has been computed above using the much higher California figures.

[5]California alleges that the maximum Texas death tax rate is 16% and, combined with the maximum rates of the United States (61%) and California (24%), that the total tax rate of all claims is slightly less than 101%. In fact, the maximum rate of the Texas inheritance tax with respect to the Hughes estate is 15%, and only when the Texas inheritance tax is *less* than the maximum federal credit for state death taxes under 26 U.S.C. §2011 (1976)--which on the Hughes estate is $63,231,072 (slightly less than 16% of the federal taxable estate)--does the Texas "pick-up" tax kick in to increase the Texas tax to equal the federal credit of approximately 16%. *See* Tex. Tax-Gen. Ann., Title 122A, arts. 14.05, 14.12. Here, using California's valuation of the estate, Texas' claim would exceed the federal credit, the "pick-up" tax would therefore not apply and Texas' maximum tax rate would be 15%. And, more importantly, the combined tax rate for all potential death tax claims would be roughly 99.7%.

[6]This surplus does not take into consideration the amount of administration expenses and other expenditures which have depleted

(footnote continued on following page)

These figures vividly demonstrate that, using California's own valuation, the estate can fully satisfy all potential death tax claims against it. With the "true" valuation being subject to dispute and litigation (and, therefore, so also the amounts of the ultimate tax claims), and in the absence of hard figures on the profitability of Summa Corporation during the five years since Hughes' death, *at best* California cannot prove that the estate cannot, today,[7] satisfy all three death tax claims. Indeed, because lingering state court disputes over the validity of the HHMI "lost will"[8] and over heirship[9] further cloud this already murky situation, it is im-

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(footnote continued from previous page)

the estate, nor does it include the interest accruing on the unpaid tax claims. However, this surplus figure also does not include the tremendous increase in the value of the estate attributable to the profitability of Summa Corporation during the five years since Hughes' death on April 5, 1976.

[7]The availability of long term payments of these death taxes allows Summa as long as 10 years to generate profits to satisfy the tax collectors' demands. *See, e.g.,* 26 U.S.C. §6166A (1977); Tex. Tax.-Gen.Ann., title 122A, art. 14.16(A)(1976); *see also Lake Shore Nat'l Bank v. Coyle,* 419 F. 2d 958, 962 (7th Cir. 1969).

[8]This "lost will" purportedly left the bulk of the Hughes estate to HHMI, a non-profit entity bequests to which would be exempt from federal, California and Texas death taxation. 26 U.S.C. §2055; Calif. Rev. & Tax Code §13842; Tex.Tax.-Gen.Ann., title 122A, art. 14.015(2).

[9]Unresolved heirship questions include claims by some persons that they are Hughes' widow, and by others that they are his natural children. If any such claims are ruled valid, the inheritance tax rates of California and Texas will be drastically reduced. The Texas tax rate would fall from 15% to 6%, and under any valuation of the estate, would thereby fit within the federal credit of $63,231,062. Tex.Tax.-Gen.Ann., title 122A, art. 14.02. And the California tax rate would drop from 24% to 14%. Calif. Rev. & Tax. Code §§§13307(a), 13404(g), 13441. And using the same valuations as in the table above, the total taxes would be roughly $429,956,000, thus leaving a surplus of over $600 million, based on California's valuation of the estate.

possible for California to do so. Only one fact is clear: California's own valuation figures show that the estate assets are sufficient to satisfy all tax claims and that no injury to California will occur.[10]

California may contend that its inheritance tax referee's figures are wrong and inflated, and that California's final valuation will be sufficiently low to reflect a risk that a California tax judgment might be partially uncollectible. But California has utilized its inheritance tax referee's valuation to advance its goals in this litigation and still urges this Court to employ that figure for certain purposes. (*See* Pet. for Cert. 25). California cannot use one value to emphasize the magnitude of the various tax claims and another to convince this Court that the estate is insufficient to satisfy those claims. Under these circumstances, California simply cannot in good faith surmount the jurisdictional threshold of *Texas v. Florida* by clearly showing that it will be harmed if Texas collects its death taxes from the Hughes estate. Once again, California has failed in its "Cinderella-like compulsion to accommodate this ill-fitting precedential 'slipper.'" *Pennsylvania v. New York*, 407 U.S. 206, 222 (1972) (Powell, J., dissenting).

B. *Texas v. Florida* Should Be Overruled

If the Court should find that California's complaint adequately fits the jurisdictional mold of *Texas v. Florida, supra*, that case should now be overruled, or at

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[10]Presumably, the estate--which is contending in Tax Court that the value of the estate assets is even less than the I.R.S. valuation--would deny that it could satisfy the tax claims of the United States, California and Texas. But the estate's position is irrelevant to this proceeding, for it cannot invoke this Court's original jurisdiction, nor can a state do so on its behalf. *Oklahoma v. Cook*, 304 U.S. 387 (1938). And California's own valuation figures preclude it from claiming that the estate assets are insufficient to pay all three tax claims.

least substantially modified so as to align its jurisdictional basis with the contours of all other original actions. Justice Stewart correctly analyzed the premises underlying *Texas v. Florida* and effectively demonstrated why it was wrongly decided. *California v. Texas*, 437 U.S. 601, 602-615 (1978) (Stewart, J., concurring). And the case at bar strikingly illustrates the soundness of Justice Stewart's conclusion.

Although California contends it is on a collision course with Texas over the issue of Hughes' domicile for purposes of death taxation, the paths of the two states in this respect actually run parallel. Each is pursuing an independent death tax claim, and "there is no constitutional impediment to both California and Texas imposing death taxes upon the Hughes estate by proceedings in their own courts." *Id.*, 437 U.S. at 612 n. 13. *See Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937). The alleged theoretical inconsistency of the two domicile claims is irrelevant in an original action because the basis of the Texas tax--be it domicile or some other concept[11]--is of absolutely no concern to

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[11]It was established long ago that two states can collect death taxes on the transfer of a decedent's intangible property. *Blackstone v. Miller*, 188 U.S. 189 (1903). For a brief period during the 1930's this rule was temporarily reversed. *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930); *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932). The Court soon recognized its error, however, and returned to the rule of *Blackstone v. Miller, supra*. *See Curry v. McCanless*, 307 U.S. 357 (1939); *Graves v. Elliot*, 307 U.S. 383 (1939). In 1942 this Court officially overruled *First Nat'l Bank v. Maine, supra*, and held that "there is no constitutional rule of immunity from taxation of intangibles by more than one State." *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 181 (1942). And this Court's view of permissible state taxation is even broader today. *See, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293 (1976).

It is therefore clear that Texas, if its statutes so provided, could constitutionally impose death taxes unrelated to domicile on the intangibles of the Hughes estate. Such a tax would impinge upon California's ability to collect any death tax judgment it might eventually have in exactly the same fashion as a domicile-based tax.

California. From the standpoint of California, any Texas tax judgment, regardless of its nature, is indistinguishable from "a judgment upon a simple contract debt...." *Milwaukee County v. White Co.*, 296 U.S. 268, 276 (1935). Therefore, California's only legitimate interest--the collectibility of its potential tax judgment--is wholly unrelated to domicile.

Thus, Hughes' death has generated two bilateral disputes (one between his estate and Texas, and another between his estate and California) over the issue of domicile and the right to impose death taxes. But the only possible dispute between California and Texas would simply be over money, not domicile or the right to tax. As Justice Stewart noted, that potential dispute--which is more analogous to a bankruptcy proceeding than to a suit in the nature of interpleader--is unlikely ever to constitute a controversy between states, and surely does not until *both* states have tax judgments which the estate cannot pay and thus occupy the "status of unsatisfied creditor." 437 U.S. at 615 n. 15.

For if the Court were truly to exercise its original jurisdiction to resolve a dispute between states--and not to assist the estate--the appropriate remedy would be to divide the available assets of the estate between the states in proportion to the relative strengths of their claims. *See* 437 U.S. at 613. But in fairness both to the states involved and to the estate, that drastic remedy should not be invoked until the estate has had the opportunity to defeat each state's claim in that state's courts. States will thus be spared the unpalatable chore of suing a sister state, and this Court not burdened with the unenviable and time-consuming task of resolving such cases, unless and until it is absolutely necessary. Therefore, while the present risk to the estate may justify its filing an interpleader in district court, the possible harm to California is far too speculative and remote to sustain an original action here. 437 U.S. at

615. *See also Alabama v. Arizona, supra; Colorado v. Kansas, supra.*

Parsing this dispute into its constituent parts not only explains why the domicile claims at issue here present no controversy between states, but also reveals other reasons why an original action is inappropriate. First, the nature and magnitude of any potential injury to California do not warrant an exercise of original jurisdiction. The injury to California, as opposed to the estate, is not the entirety of the Texas tax claim, but rather is only the amount by which its potential tax claim may be uncollectible. This type of dispute is simply not one "which, if it arose between independent sovereignties, might lead to war." *Missouri v. Illinois*, 200 U.S. 496, 518 (1906) (per Holmes, J.). *See generally* 8 M. Whiteman, *Digest of International Law* 523 (1967); Note, *International Enforcement of Tax Claims*, 50 Colum. L. Rev. 490 (1950). As Chief Justice Hughes stated,

> "In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State--the essential quality of the right asserted--but we must also inquire whether recourse to that jurisdiction in an action by a State merely to recover money alleged to be due from citizens of other States is necessary for the State's protection." (*Massachusetts v. Missouri, supra*, 308 U.S. at 18.)

Here, where California previously entered into a conditional agreement settling its tax claim for 18% of the federal taxable estate (down from its maximum claim of 24% of the taxable estate under the California valuation), the grave injury to be suffered by California (allegedly being able to collect only 23 of its 24% tax

rate) is exceedingly hard to discern.[12]

Second, because the domicile issue underlies only the bilateral dispute each state has with the estate and not that between the states themselves, an original action under *Texas v. Florida* is inappropriate because it effectively eliminates the parties' right to have a jury resolve the domicile issue. A right to jury trial apparently does not exist in a suit between states tried in this Court. *See, e.g.*, 28 U.S.C. §1872 (right to jury in original actions at law against citizens of the United States). The usual procedure, which was utilized in *Texas v. Florida*, is to appoint a special master to take evidence and find facts, and "this Court regularly acts on the basis of the Master's report and exceptions thereto." *United States v. Raddatz*, __U.S.__, 100 S. Ct. 2406, 2416 n. 11 (1980). *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 511 (1971) (Douglas, J., dissenting).

Third, an original action under *Texas v. Florida* cannot, as California suggests, provide a wholesale remedy for future domicile disputes. For even California now concedes that jurisdiction under *Texas v. Florida* cannot be invoked unless the tax claims of the competing states, together with the federal estate tax, exceed 100% of the estate's assets, such that one state's claim will be at least partially uncollectible. (Pet. for Cert. 14 n. 14). Effective shortly after Hughes' death, the maximum rate of the federal estate tax was reduced from 77% to 70%, with no corresponding reduction in the amount of the maximum available credit for state death

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[12]California still emphasizes that Texas' claim "will substantially impair the opportunity California might otherwise have to negotiate a fair and reasonable compromise of its tax claim against the Estate." Complaint ¶26. This pinpoints California's true concern, which is not its professed fear of being unable to collect some future tax judgment, but rather is that it will be unable to parlay its high tax rate into a settlement if it must first establish the merits of its claim in its own courts.

taxes. *See* 26 U.S.C. §§2001, 2011 (1976). Thus, claims by only two states--even where one has extremely high maximum death tax rates exceeding the federal credit, such as California's rate of 24%, rather than the customary "pick-up tax" which falls within the federal credit--would not exceed that 100% jurisdictional limit even on the largest of estates. On a "small" estate of two million dollars, which would incur a maximum federal estate rate of 45%, it would take competing domicile claims from at least *eight* states whose maximum tax rate equals the federal credit of 7.2% in order to provide the necessary predicate for original jurisdiction under *Texas v. Florida.* This would provide a remedy from double taxation, under the guise of resolving a dispute between states, only for the estates of the most wealthy and most mobile persons.

Finally, the proposed original action to determine Hughes' domicile for death tax purposes is decidedly unlike the escheat cases cited by California to support its complaint.[13] *See* Motion for Leave 36-37. In those cases it was indisputable that only one debt, of an amount certain, was owed and that more than one state could not require that debt to be paid without denying due process of law to the holder of the property to be escheated. A direct conflict therefore existed between states as to which would be *the one* to be paid. Here, as Justice Stewart makes plain, both Texas and California can constitutionally impose domicile-based death taxes on the Hughes estate. *California v. Texas, supra,* 437 U.S. at 612 n. 13. *See also Worcester County Trust Co. v. Riley, supra; State Tax Comm'n of Utah v. Aldrich, supra.* An original action to determine domicile is therefore not necessary to provide the states with a

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[13] *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71 (1961); *Texas v. New Jersey,* 379 U.S. 674 (1965); and *Pennsylvania v. New York,* 407 U.S. 206 (1972).

forum in which to enforce their tax claims, as was needed in the escheat cases, because both states may do so "by proceedings in their own courts." 437 U.S. at 612 n. 13. No controversy between states arises with respect to domicile because *both* states can tax.

California admits that "[i]f both states can be satisfied from the estate's assets, each state may collect and enforce a judgment and there is thus no interstate controversy." (Pet. for Cert. 14 n. 14). Were California's escheat analogy and argument valid, the requirement of *Texas v. Florida* that the tax claims exceed 100% of the estate would be rendered meaningless (*see Massachusetts v. Missouri*, 308 U.S. 1 (1939), because the logic of that argument would not only permit but require an original action in every such domicile dispute, regardless of the size of the estate or the amount of the tax claims. California's true position on this point is as obscure as its argument, because in the lower courts--when the Hughes estate proffered the same escheat analogy in support of its district court interpleader action by urging that the states' tax claims are unconstitutional--California's counsel wrote:

> "Since there is no constitutional barrier to both California and Texas imposing domicile-based inheritance taxes on the Estate, the Estate's *Western Union* claim is wrong as a matter of law." (Memorandum of Defendants Cory and Alvord in Reply to Plaintiffs' Opposition to Motion to Dismiss at p. 30).

And again in the Court of Appeals, California's counsel noted the holdings in *Worcester County Trust Co. v. Riley, supra*, and *State Tax Comm'n of Utah v. Aldrich, supra*, and this Court's denial of leave to file a complaint in *California v. Texas, supra*, and concluded:

> "In light of this history, California is now satisfied that *Western Union* is not applicable

> to proceedings of this kind." (Brief for Appellees and Cross-Appellants Cory and Alvord at p. 76 n. 50).

Apparently California's satisfaction was short-lived for it has again "...'changed positions as nimbly as if dancing a quadrille.' *Orloff v. Willoughby*, 345 U.S. 83, 87 (1953)." *Id.*

For all of these reasons, *Texas v. Florida*, which was a truly unique exercise of this Court's original jurisdiction, should now be overruled. California is in no imminent danger of suffering injury at the hands of Texas, and this Court is simply not a forum in which any perceived injury to the estate can initially be averted.

II.

THE PENDING INTERPLEADER BROUGHT PURSUANT TO 28 U.S.C. §1335 PROVIDES AN APPROPRIATE ALTERNATIVE FORUM FOR THIS CASE

If the Court should decide that *Texas v. Florida* is still authoritative and that California's complaint meets the jurisdictional requirements of that decision, the motion for leave to file a bill of complaint should nevertheless be denied. The interpleader action brought by the Hughes estate in federal district court under 28 U.S.C. §1335 "provides an appropriate forum in which the *issues* tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976)(emphasis in original). This Court can therefore exercise its discretionary power to refuse to accept a case within its original jurisdiction and remit this matter to federal district court.

This Court has long recognized its power to decline to hear cases over which it concededly has original jurisdiction, and has adhered to a philosophy that its "original

jurisdiction should be invoked sparingly." *Utah v. United States*, 394 U.S. 89, 95 (1969). That discretionary power arises from the tremendous drain which original actions place on the Court's limited resources.

> "To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it." (*Massachusetts v. Missouri, supra*, 308 U.S. at 19).

More recently, Justice Harlan noted the increasing "frequency with which States and nonresidents clash over the application of state laws concerning taxes..." and concluded that "[i]t would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies." *Ohio v. Wyandotte Chemicals Corp., supra*, 401 U.S. at 497. And devoting substantial amounts of the Court's time to resolving issues of fact and local law inevitably cuts into the Court's primary responsibility as final arbiter of federal law. *Id.*

The Court has therefore wisely decided to remit original actions to alternative forums when possible. California argues against that policy here, asserting that 28 U.S.C. §1251 (a) makes this Court's jurisdiction exclusive and bars application of the "sparing use" doctrine. This argument was squarely rejected in *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972):

> We construe 28 U.S.C. §1251 (a)(1), as we do Art. III, §2, cl. 2, to honor our original jurisdic-

> tion but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

The interpleader action filed by the Hughes estate in federal district court provides an available and appropriate alternative forum where the domicile issue tendered here by California can be resolved. California, however, contends that this pending interpleader is not a suitable alternative to an original action for three reasons: (1) lack of subject matter jurisdiction under 28 U.S.C. §1335; (2) this Court's exclusive jurisdiction under 28 U.S.C. §1251(a); and (3) "unsuitable" venue. None of these objections is valid.

The Court of Appeals has held that subject matter jurisdiction over the estate's pending interpleader is present under 28 U.S.C. §1335. *Lummis v. White*, 629 F. 2d 397 (5th Cir. 1980). The minimal diversity necessary to sustain jurisdiction was found to rest adequately on the citizenships of plaintiff-stakeholder William Lummis (the administrator of the Hughes estate in Texas) and defendant-claimant H.B. Alvord (the county treasurer of Los Angeles County). *Id.* The Fifth Circuit's ruling with respect to both of these gentlemen is correct.

The citizenship of Lummis, who is indisputably an interested stakeholder, can be utilized to support diversity jurisdiction under section 1335. 629 F. 2d at 403. In so holding, the Fifth Circuit followed the overwhelming weight of case law and commentary, as well as sound

logic, which permit and urge broad application of interpleader. *See, e.g., Builders & Developers Corp. v. Manassas Iron & Steel Co.,* 208 F. Supp. 485, 488 (D. Md. 1962); *Pan Am. Fire & Cas. Co. v. Revere,* 188 F. Supp. 474, 477 n. 8 (E.D.La. 1960); 7 C. Wright & A. Miller, *Federal Practice & Procedure,* §1710 at pp. 405-407 (1972); *cf. State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523 (1967)(§1335 requires only "minimal diversity"). *See* Brief in Opp. to Pet. for Cert. 21-23.

Similarly, the Court of Appeals was correct in refusing to consider California's argument that a change in its inheritance tax procedure, which became effective only after the Fifth Circuit's decision had been rendered, dissipated previously existing jurisdiction. The revision in California law removes county treasurers from the inheritance tax collection procedure, and California contends that Alvord is therefore no longer a claimant and that diversity jurisdiction has now been erased. However, it is clear that the jurisdiction which attached when the original complaint was filed cannot be defeated by the unilateral action taken by California on the appeal of this case. *Smith v. Sperling,* 354 U.S. 91 (1957); *Mollan v. Torrance,* 9 Wheat. (22 U.S.) 537 (1824).

California next argues that even if subject matter jurisdiction under section 1335 is otherwise satisfied, a federal district court cannot entertain this action because 28 U.S.C. §1251(a) vests jurisdiction exclusively with this Court. But it is clear that because this Court's original jurisdiction is not constitutionally exclusive, Congress can grant concurrent original jurisdiction of such suits to the lower federal courts. *Ames v. Kansas,* 111 U.S. 449 (1884); *United States v. Louisiana,* 123 U.S. 32,36 (1887). Section 1251 (a) is merely a general directive from Congress that is superseded by statutes otherwise vesting jurisdiction in federal district courts in cases where a state happens to be a party. *See, e.g., United States v. California,* 297 U.S. 175 (1936); *Case v.*

Bowles, 327 U.S. 92 (1946); *Minnesota v. United States*, 125 F. 2d 636 (8th Cir. 1942)(construing section 233 of the Judicial Code, 28 U.S.C. §341, the predecessor of section 1251(a)).

That 28 U.S.C. §1335 similarly supersedes the exclusivity provisions of section 1251(a) is implicit in the holding of *Worcester County Trust Co. v. Riley, supra.* For if the predecessor of section 1251(a) precluded district court jurisdiction of such an interpleader action (or if subject matter jurisdiction was absent for lack of diversity, as California asserts here), this Court would surely have decided *Worcester County* on that statutory basis rather than unnecessarily deciding the Eleventh Amendment issue on which its judgment was based.[14] *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1939) (Brandeis, J., concurring). And as discussed above, this Court's recent holdings in *Arizona v. New Mexico, supra*, and *Illinois v. City of Milwaukee, supra*, directly refute California's argument that no other court but this can entertain this action. *See also Massachusetts v. Missouri, supra.*

Finally, California urges that statutory interpleader is "unsuitable" because venue must be laid in one of the claimant states. Under 28 U.S.C. §1397 venue is restricted to districts "in which one or more of the claimants reside," and transfers under 28 U.S.C. §1404(a) are available only to districts in which the action originally "might have been brought." *See Hoffman v. Blaski*, 363 U.S. 335 (1960). While therefore correct in its premise that venue options for that interpleader are limited to districts within the claimant states, California is mistaken in its conslusion that an action under sec-

[14]Similarly, if venue in a claimant state were somehow to defeat statutory interpleader jurisdiction, the venue in *Worcester County*--laid as it was in the claimant State of Massachusetts--would have provided a non-constitutional basis for resolving that case, and this Court would not have decided the Eleventh Amendment issue.

tion 1335 is therefore inappropriate. A federal district court is a "national tribunal" *(Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888)) and constitutes the "neutral forum" that California professes to seek. Indeed, the very reason underlying the grant of diversity jurisdiction to federal district courts was to provide a forum in which out-of-state litigants could escape local prejudice. 13 C. Wright & A. Miller, *Federal Practice & Procedure*, §3601 at p. 574 (1975).

One cannot help but wonder whether this venue issue, or the section 1251(a) argument discussed above, would have been raised here--or whether this original action would ever have been filed--if the district court had granted California's motion to transfer the interpleader action to Los Angeles.[15] California's objections to venue all rest on unfounded and unjustified assumptions about the quality of justice dispensed in federal district courts. This controvenes the far wiser and less parochial counsel that "we cannot presume that a trial will proceed other than fairly in any federal forum in which venue exists." *Chicago, R.I. & P.Ry. v. Igoe*, 212 F. 2d 378, 382 (7th Cir. 1954), *cert. denied*, 350 U.S. 822 (1955). *Accord, Patterson v. Louisville & Nashville R.R.*, 182 F. Supp. 95 (S.D. Ind. 1960).

An excellent example demonstrating the availability, efficacy and "suitability" of a federal district court as an alternative forum for the resolution of a suit allegedly between states is the recent litigation arising from the Texas Mediterranean fruit fly ("Medfly") quarantine. On February 24, 1981, California filed a motion for leave

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[15]In the lower courts, no party even suggested that a district court lacked jurisdiction of the estate's interpleader action because 28 U.S.C. §1251(a) made the Court's jurisdiction exclusive. That position cannot be reconciled with California's motions to transfer the case to a federal district court in Colorado or Los Angeles. Only after the district court had denied those motions, and the Fifth Circuit had affirmed that ruling, dic California first raise its section 1251(a) argument in this Court.

to file a complaint with this Court against Texas, an application for a temporary restraining order, and a motion for preliminary injunction, all asserting that the Texas Medfly quarantine constituted a serious and imminent threat to the State of California. *California v. Texas*, No. 87, Original (1981). This Court subsequently issued a temporary order restraining the State of Texas from imposing a quarantine against fruits and vegetables grown in California.

Meanwhile, after that original action had been instituted, a group of California avocado growers filed suit against the Commissioner of the Texas Department of Agriculture in the United States District Court for the Northern District of Texas, seeking the same injunctive relief against the Texas quarantine as California was seeking from this Court. The Dallas district court entertained the action, agreed with the California plaintiffs, and worked out and entered an agreed order lifting the quarantine. *See* Appendix "B", *infra.*

On March 11, 1981, California informed this Court of the district court's order and requested that consideration of its motion for leave to file a complaint be deferred until mid-summer, just in case Texas might reinstate its quarantine. On April 6, 1981, this Court denied California's motion for leave to file a bill of complaint.

Having thus prevailed in the Medfly litigation by virtue of the outcome of the federal district court suit in Dallas, California's contentions in this case--that jurisdiction rests exclusively with this Court under 28 U.S.C. §1251(a), and that California will not receive impartial justice from a district court situated in Texas--ring less than true. For even if the avocado growers are not viewed as a mere surrogate for California in the Dallas proceeding (or vice versa in No. 87, Original), thus directly refuting California's exclusivity argument under section 1251(a), that district court action is in-

structive here in at least two respects. First, it shows that a federal district court in Texas can impartially administer justice even if the result is to override the decision of a Texas official in favor of California's interests.

Second, the avocado growers can be seen as analogous to the Hughes estate in this litigation. The interpleader action filed by the estate in federal district court against the state taxing officials is the equivalent of the suit filed by the growers against the Texas Commissioner of Agriculture. This interpleader can resolve the domicile dispute each state has with the Hughes estate just as fairly and effectively as the Dallas suit settled the issues tendered to this Court in No. 87, Original--and with similar savings of this Court's valuable judicial resources.

In sum, the interpleader action which has been pending in federal district court since the summer of 1978 is a suitable vehicle for a prompt, fair resolution of the domicile issue tendered here. Preliminary issues of joinder and venue have already been settled, and some depositions to preserve testimony have been taken in that proceeding. It provides an alternative forum, already in existence and awaiting this Court's directive, to which the Court can remit this litigation.

CONCLUSION

For these reasons, the motion for leave to file complaint should be denied.

DATED: May 11, 1981.

Respectfully submitted,

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PROOF OF SERVICE

I, William David Deaderick, a member of the Bar of this Court, do hereby certify that three true and correct copies of the above and foregoing Brief in Opposition have been served on each of the following by depositing the same in a United States post office, with first-class postage prepaid, certified, return receipt requested, on this 11th day of May, 1981, addressed as follows:

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WILLIAM RICE LUMMIS, AND ANNETTE GANO LUMIS, Texas Temporary Co-Administrators of the Estate of Howard R. Hughes, Jr., Deceased,	Civil Action File No. A-78-CA-148
Plaintiffs,	
v.	AFFIDAVIT OF JOHN A. WOODWARD, III, IN SUPPORT OF MOTION FOR CHANGE OF VENUE
JOHN HILL, BOB BULLOCK, EVELLE J. YOUNGER, KENNETH CORY, H.B. ALVORD, WILLIAM RICE LUMMIS, FIRST NAT'L BANK OF NEVADA and RICHARD GANO,	
Defendants.	

I, John A. Woodward, III, being first duly sworn, depose and say:

1. I am, and since May, 1968 have been, a duly appointed Inheritance Tax Referee of the State of California. I have personal knowledge of the facts stated herein and could competently testify thereto if called upon to do so as a witness, except as hereafter indicated.

2. On September 15, 1976, pursuant to the provisions of Calif. Rev. & Tax Code § 14501 and Calif. Probate Code § 605, I was appointed by the Superior Court of the State of California for the County of Los Angeles to appraise the estate of Howard R. Hughes, Jr., the probate of which is pending in said Court as No. P 621 359. Pursuant to Calif. Rev. & Tax Code § 14501, I was charged with the responsibility of submitting a report to the Court on the "clear market value" of all property included in transfers subject to the California Inheritance Tax, the amount of tax, if any, due and payable on each such transfer and "such other facts . . . as [would] assist the Court in the determination of the tax."

3. Pursuant to this statutory responsibility, I have prepared an inheritance tax report for the estate of Howard R. Hughes, Jr., a true and correct copy of which is attached hereto as Exhibit A. This report, however, has not been filed with the Superior Court as would otherwise be required by California law, because it is possible that my activities may directly or indirectly come within the terms of the temporary restraining order issued by the Court on July 20, 1978.

4. The inheritance tax report which I have prepared shows a "clear market value" of property in the Hughes estate subject to California inheritance tax of $1,039,712,436. In accordance with Calif. Rev. & Tax Code §§ 13311 & 13312, this figure represents the market value of all taxable property in the Hughes estate as of Mr. Hughes' death, less the deductions permitted by the California Revenue and Taxation Code. This valuation of the Hughes estate is based upon my finding that Howard Hughes was a domiciliary of the State of California and the County of Los Angeles at the time of his death.

5. Under California law, 'any person interested, including the controller, may file a written objection to the

[inheritance tax referee's] report." Calif. Rev. & Tax Code § 14510. The filing of my report, therefore, in no way prevents the California Controller from claiming a higher valuation for the Hughes estate than is set forth in my report.

Dated: August 21, 1978.

/s/

John A. Woodward, III

Subscribed to and sworn before me this 21 day of August, 1978.

/s/ Myra A. Moore

Notary Public

Name, address and telephone number of Attorneys(s)	
Davis & Cox 1900 Avenue of the Stars, Ste. 1450 Los Angeles, Ca 90067 553-3744	Name and address of representative/petitioner
Gibson, Dunn & Crutcher 515 So. Flower St. Los Angeles, Ca 90071 488-7000	Richard C. Gano, Jr. %Gibson, Dunn & Crutcher 515 So. Flower St. Los Angeles, Ca 90071

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF

	Case Number P 621 359
	REPORT OF INHERITANCE TAX REFEREE
HOWARD ROBARD HUGHES, JR. Deceased.	Amount of Tax $249,497,419
Date of Death: April 5, 1976	Additional Tax, Revenue and Taxation Code Sections 13441-2 $_____
	Total Tax Due State $249,497,419

The undersigned Inheritance Tax Referee reports to the Court as follows:

The above-named decedent died intestate on the date stated above, a resident of the County of

By reason of such death the property hereinafter referred to is subject to taxation under the Inheritance Tax Law in the above-entitled proceeding.

That at the date of death of said decendent the fair market value of said property was the sum of:

Described in inventory and appraisement file herein:	$ 143,478
Not in inventory, described as follows:	
Per supplemental schedule of uninventoried asset	$1,106,201,939
Total:	$1,106,345,516

DEDUCTIONS should be made therefrom as follows:

Expenses of funeral and of last illness	$18,413
Debts of deceased	7,337,039
Taxes due at decendent's death	
Executor's or administrator's commissions	11,067,335
Fees of attorney for same	11,067,335
Expenses of administration	7,500
Other deductions: encumbrances	37,135,458
Total deductions	¢66,633,080
The CLEAR MARKET VALUE of said property is therefore	$1,039,712,436

That said property passed to the following named persons, whose relationship to decedent, the character and clear market value of whose respective interests at the time of death of decedent and the inheritance or transfer tax due thereon are as hereinafter shown:

Name	Relationship to deceased	Exemptions and rates		Tax
Character and value of interest William Kent Gano, cousin 1/12 interest in disclaimed asset		6652	$300 exempt Tax on balance	$635
Richard Gano Wallace, cousin - same		6652	same	635
Doris Gano Wallace, cousin - same		6651	same	635
Annette Gano Gragg, cousin - same		6651	same	635
Howard Hughes Gano, cousin - same		6651	same	635
Allene Lummis Russell, cousin - same		6651	same	635
Annette Gano Lummis Neff, cousin - same		6651	same	635
William Rice Lummis, cousin - same		6651	same	635
Frederick Rice Lummis, Jr., cousin - same		6651	same	635
Janet Houstoun Davis, cousin - same		6651	same	635

Sara Houstoun Lindsey, cousin - same	6651	same	635
James Patrick Houstoun, Jr., cousin - same	6652	same	635
Annette Gano Lummis, aunt - residue of estate	1,039,632,622	same	249,497,419
	1,039,712,436		$249,497,419

Dated [illegible]

/s/ John A. Woodward, III
Inheritance Tax Referee

ASSET	APPRAISED VALUE
1. (a) 75,000 shares of $100 par value common stock of Summa Corporation ("Summa"), a Delaware Corporation, evidencing 100% of all of the outstanding stock of said corporation, and (b) 755 shares of $100 par value common stock of Hughes Television Network, Inc., ("HTN"), a Nevada corporation, evidencing 100% of all of the outstanding stock of said corporation.	$1,043,000,000
2. 1,960 shares of $100 par value common stock of Hughes Air Corp., a Delaware corporation, evidencing 22% of all of the outstanding stock of said corporation.	3,847,590

3. 1,060,179 shares of $1.00 par value common stock of Atlas Corporation, a Delaware corporation (presently 212,035.8 shares reflecting a 1 for 5 reverse stock split subsequent to April 5, 1976), evidencing approximately 7.0178% of the outstanding stock of said corporation.	5,102,111
4. 100 shares of $10 par value common stock of Film Investments, Inc., a Nevada corporation, evidencing 100% of all of the outstanding stock of said corporation.	378
5. 175 shares of $100 par value common stock of Desert Inn Improvement Company, a Nevada corporation, evidencing 100% of all of the outstanding stock of said corporation.	1
6. 1,000 shares of $1.00 par value common stock of H-Tex, Incorporated, a Texas corporation, evidencing 100% of all of the outstanding stock of said corporation.	1
7. Note receivable from Summa. P. O. Box 14,000 Las Vegas, Nevada 59156, dated December 31, 1968, due December 31, 1976; interest from December 31, 1975, at the prime rate being charged by Bank of America National Trust and Savings Association as may be determined from time to time.	15,000,000
Accrued interest through April 5, 1976.	269,291
8. Note receivable from Summa dated December 30, 1971, due on December 30, 1976; interest from December 30, 1975, at a rate equal to the minimum lending rate being charged by Bank of America National	

Trust and Savings Association for like loans on the first business day of each quarter.		14,000,000
Accrued interest through April 5, 1976		266,000
9. Note receivable from Summa dated December 31, 1970, due December 31, 1976; interest from December 31, 1975, at the prime rate being charged by Bank of American National Trust and Savings Association as may be determined from time to time.		6,500,000
Interest		116,668
10. Note receivable from Summa dated December 31,1975, due December 31, 1980; interest from December 31, 1975, at a rate equal to the minimum lending rate being charged by Bank of America National Trust and Savings Association for like loans on the first business day of each calendar quarter.		13,000,000
Accrued interest through April 5, 1976.		246,990
11. Note receivable from Rosemont Enterprises, Inc., One State Street, Plaza, New York, New York, 10004, dated September 6, 1976, due September 6, 1975; interest from September 6, 1974, at the prime rate being charged by Texas Commerce Bank as may be determined from time to time.		
Principal	500,000	
Accrued interest through April 5, 1976	76,865	
	567,865	225,000

12. Note receivable from Arthur M. Mortensen, c/o Hughes Television Network, 1133 Avenue of the Americas, New York, New York 10036, dated June 1, 1974, due June 1, 1982; interest from June 1, 1974, at six percent (6%) per annum, payable annually and interest on past due interest at eight percent (8%) per annum.	50,000
Accrued interest through April 5, 1976.	5,743
13. Cash on hand.	35
14. Checking account No. 100-9604 at Texas Commerce Bank, Houston, Texas, styled Howard R. Hughes.	609,522
Checking account No. 127-4018 at Texas Commerce Bank, Houston, Texas, styled L-M Company.	61,546
15. Account receivable, without interest (on an accrual basis), as of April 5, 1976, from Summa, P.O. Box 14000, Las Vegas, Nevada 89156, said account being an advance to Summa to reimburse it for payment for personal expenses, including aircraft expenses (said account having arisen on December 31, 1975, when decedent directed that certain of his personal funds be advanced to Summa for the reasons set forth above).	100,982
16. Account receivable from the United States for refund of overpayment of 1975 federal income taxes.	431,173
17. Account receivable without interest due on demand from Clifford J. Weismann, 7345 El Parque, Las Vegas Nevada 89117.	4,000

18. Account receivable without interest due on demand from H-Tex, Inc. 919 Americana Building, Houston, Texas 77002. 582,024

19. Claim against Gordon J. Margulis, 4000 San Joaquin, Las Vegas, Nevada 89102, said claim relating to advances (without interest) of moneys at various times to Gordon J. Margulis under oral contract with decedent payable on demand as follows:
(i) $11,000,00 advanced on 2/2/71;
(ii) $400.00 advanced on 3/3/71;
(iii) $500.00 advanced on 3/31/71; and,
(iv) $300.00 advanced on 3/22/72. -0-

20. Claim of $342.33 against the State of California, Sacramento, California, for refund without interest of payroll taxes paid by Howard Robard Hughes, Jr., during 1975 due on December 31, 1975. 347

21. Gaming operations conducted in the name of Silver Slipper, Las Vegas, Nevada, a sole proprietorship. 1

22. Oil and gas sole proprietorship operations conducted in the name of H-Tex, Incorporated, excluding mineral leases located in Louisiana (more fully described in item 6, Schedule A, herein) and the account payable to the Estate as set forth at item 4 above, per attached Balance Sheet. 117,542

23. Oil and gas sole proprietorship exploration activities conducted in the name of Cheyenne Corporation, per attached Balance Sheet. 1,311

24. Distribution of motion picture films listed further herein conducted in the name of Howard R. Hughes Productions, a sole proprietorship.	3,710
25. Motion Picture Films and Related Rights.	
A. Story and motion picture rights to "Jet Pilot".	100,000
B. Story and motion picture rights to "The Outlaw".	23,000
C. Story and motion picture rights to "The Conqueror".	100,000
26. The following aircraft were held by Dakota & South Bend Securities Company, Ltd., as nominee for Summa which was acting as nominee for decedent:	
A. Hawker Siddeley 748-26 Reg. No. G-AYYG	800,000
B. Hawker Siddeley HH-125-400 Reg. No. G-BAZB	680,000
C. Hawker Siddeley 125 Reg. No. G-AZAP	780,000
27. Conditional Sales Contracts Relating to Aircraft:	
Rockwell Commander 685 Reg. No. 39136M	-0-

Rockwell Turbo Commander 690 Reg. No. N9150M	94,410
Rockwell Turbo Commander 690A	-0-
Grumman Gl Reg. No. N712MP	-0-
Grumman Gl Reg. No. N1902D	93,433
Convair 240 Reg. No. N122T	-0-
Convair 240 Reg. No. N240DW	-0-
Convair 240 Reg. No. N1899K	-0-
28. Jewelry, not previously inventoried	5,655
29. Contract with Rosemont Corporation.	1
30. Miscellaneous trophies, pictures, photographs, mementoes and other personal property and personal effects previously appraised.	8,120
31. Three Bank of America cashier's checks dated 12/2/52 in the amount of $1,002.60, each payable to M. Gerber.	3,008
32. Sixty-four $5.00 gaming tokens.	320
TOTAL VALUE	1,106,201,938

APPENDIX "B"

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CALIFORNIA AVOCADO COMMISSION, et al., *Plaintiffs,*	§	
V.	§	CIVIL ACTION NO. CA-3-81-0295-G
REAGAN V. BROWN, COMMISSIONER OF THE TEXAS DEPARTMENT OF AGRICULTURE, *Defendant.*	§	

ORDER

This order is to confirm the dismissal of this case on March 6, 1981, done in open court, the parties then having agreed to a settlement, including the lifting on March 6, 1981, of the Texas Mediterranean Fruit Fly Quarantine (Rule 176.22,20.001); accordingly, this case is DISMISSED, with each party to bear its costs.

/s/

Patrick E. Higginbotham
United States District
Judge

Office-Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 88, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF TEXAS, *et al.*,
Defendants.

ON MOTION FOR LEAVE TO FILE COMPLAINT

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

Of Counsel:

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Division of Tax Administration
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No. 88, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA,
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v.

STATE OF TEXAS, *et al.*,
Defendants.

ON MOTION FOR LEAVE TO FILE COMPLAINT

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

INTRODUCTION

The Brief in Opposition filed by Texas (hereafter "Tex. Br.") contains much irrelevant material and many unsupported charges. We shall not respond to the incomplete and one-sided description of Howard Hughes' life (Tex. Br. 1-2), other than to note that, in the last thirty years of his life, Howard Hughes spent less than a week in his alleged "hometown" of Houston. Similarly, the Texas charge (Tex. Br. 16 n.12) that California's "true concern" is to reach a favorable settlement with the Estate without having to litigate the merits of its claim ignores the fact that it is California which has sought from the outset of the Hughes Estate litigation to obtain a neutral forum in which to

try its domicile claim, first by filing *California* v. *Texas*, 437 U.S. 601 (1978), then by seeking a change of venue in the ensuing interpleader action, and, lastly, by renewing its motion for leave to file in this action.[1] Indeed, until the present stage in these proceedings, Texas has been the only party which has sought to frustrate the goal of litigating all the domicile claims in a single forum by opposing California's Motion for Leave to File in *California* v. *Texas*, and by contending in the lower courts that the interpleader action was barred by the Eleventh Amendment. Its present objective is transparent: to avoid at all costs having to defend its implausible domicile claim in any forum other than before a jury of Texas citizens.

We shall deal in this response with the attempt by Texas to distinguish and advocate the overruling of *Texas* v. *Florida*, 306 U.S. 398 (1939). In Part I, *infra*, we show that this case squarely meets the jurisdictional standard established by that decision because California can show a real and substantial risk of injury at the hands of Texas. In Part II, *infra*, we shall demonstrate that *Texas* v. *Florida* is not an aberration which should be overruled, but rather serves a vital function in the federal system by resolving controversies such as this. In Part III, *infra*, we demonstrate that there is no alternative forum in which this controversy between states can be resolved.

ARGUMENT

I.

THE ESTATE'S ASSETS ARE INSUFFICIENT TO SATISFY THE TAX CLAIMS OF BOTH CALIFORNIA AND TEXAS.

The principal argument advanced in the Brief In Opposition is the claim that this case presents no real controversy between California and Texas because "California cannot

[1] The fact that California filed an alternative motion seeking to change the venue of the interpleader action to Los Angeles is not inconsistent with its desire for a neutral forum, since that motion was clearly stated as less preferable than transfer of the action to Colorado. *See* Petitioners' Reply Brief on Certiorari in *Cory* v. *White* (No. 80-1556) 9 n.10.

prove that the estate cannot . . . satisfy [the] death tax claims" of California, Texas and the United States. (Tex. Br. 11; *see also id.* at 6-12). This argument rests on a distortion of the legal standard applicable to California's motion and a markedly skewed assessment of the risk that California's tax claim will be left unsatisfied because of the competing tax claims of the United States and Texas. And it also rests on a demonstrably unsound factual premise: that the total federal and state tax claims are *less* than 100% of the Estate's assets. As will be explained, Texas is able to come to this conclusion only by assuming that while the "true" value of the Estate's assets is $1.1 billion, the Internal Revenue Service will levy an estate tax on the basis of a $468 million valuation. Both legally and factually, the Texas approach is incorrect.

At this juncture, *Texas* v. *Florida*, 306 U.S. 398 (1939), does not require proof that California's interest in collecting the full tax due from the Estate will be harmed if Texas collects the tax it claims; instead, the case requires only a showing that "conflicting claims are asserted and that the consequent risk of loss is substantial." *Id.* at 406. The invocation of the equity jurisdiction recognized in *Texas* v. *Florida* does not and cannot require a demonstration to a near certainty that the inconsistent claims will exceed the Estate's assets, for the very purpose of the jurisdiction is to "avoid[ ] . . . the *risk* of loss resulting from the *threatened* prosecution of multiple claims, ... " *Id.* at 410 (emphasis added). To stay the invocation of the jurisdiction, as Texas suggests (Tex. Br. 14), until the competing claims are reduced to judgment would frustrate that purpose, since to await those events would force California to suffer the risks and expenses of multiple adjudication where only one claim, under any circumstances, can be valid and only one litigation is necessary.

The Court recognized as much in *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 523, 532-33 (1967), when it held that a stakeholder did not have to wait until competing claims were reduced to judgment before invoking interpleader because, *inter alia*, such a "race to judgment" might be unfair to claimants. The present controversy demands the same response, as forcing California to obtain a judgment in its courts

before seeking relief here would expose it to the real danger that the judgment which Texas obtained in its own courts could be perfected and satisfied in the interim, leaving California with insufficient assets with which to satisfy its claim.[2]

Texas v. *Florida*'s holding that the Court's original jurisdiction may be invoked by a showing that "the risk of loss" to the plaintiff state is "substantial" is not, as Texas would have it, "truly unique". (Tex. Br. 19). For example, in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), the Court rejected claims similar to those advanced by Texas here in determining to exercise original jurisdiction over a controversy between states concerning inconsistent water claims to a river. The Court held that because there was not enough water in the river to satisfy "the claims asserted against it" (*id.* at 610), the original jurisdiction was properly invoked despite the fact that there had prior to that time been sufficient water for the three claimant states. *Id.* Similarly, in the escheat cases (*Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961), *Pennsylvania* v. *New York*, 407 U.S. 206 (1972) and *Texas* v. *New Jersey*, 379 U.S. 674 (1965)), states seeking to escheat abandoned funds were allowed to invoke the original jurisdiction despite the fact that no rival state had obtained an inconsistent judgment and, indeed, there was a substantial probability that there would never be any. *See* California's Memorandum in Support of Motion for Leave to File Complaint (hereafter "Cal. Mem.") 36-37 and n.17. California thus need not "prove" that it will be injured if Texas collects its claimed inheritance tax; it need only show a substantial risk of injury.

Texas contends that California cannot make the required showing. Because the three taxing authorities—California, Texas and the United States—have made different preliminary valuations of the Estate, Texas claims a likelihood that the ultimate taxes assessed by each authority against the Estate may be based on inconsistent valuations. It further contends

[2] Forcing California to await the outcome of the Texas and federal valuation proceedings—which would be the only way totally to eliminate the possibility that inconsistent valuations might provide California with sufficient assets to satisfy its tax claim—has the same defect.

that, if the "true value" of the Estate is as large as the California Inheritance Tax Referee initially claimed, and not the substantially lower figure claimed by the IRS, the Estate will be able fully to satisfy all potential death tax claims against it.

This argument requires the Court to assume that the IRS has assessed the Hughes Estate at 42% of its "true value." Moreover, it ignores the fact that the uncertainty inherent in estimating the Estate's "true value" is a two-edged sword. The "true value" of the Estate will not be determined by unilateral declarations of the several taxing authorities but through lengthy judicial or administrative proceedings between each taxing authority and the Estate or arm's-length negotiations. The disparity which presently exists between the Estate's valuation, that of the Internal Revenue Service, and that of the California Inheritance Tax Referee, will undoubtedly be minimized or eliminated when the issue is subject to the adversary process of litigation and negotiation. If the Estate's ultimate "true value" is determined by the federal and state courts, there is no reason to suppose that these valuations will be wildly disparate and it is even less likely that the Estate would agree to different valuations with different taxing authorities.

But even if the three jurisdictions ultimately conclude their tax proceedings with markedly different valuations, there is no reason to suppose, as Texas does, that this discrepancy will diminish the likelihood that California's tax claim will remain unsatisfied. It is equally likely that one or more of the taxing jurisdictions may *overvalue* the Estate, which would only exacerbate the problem. And, as we shall soon show, the Texas argument ignores a crucial factor—interest on the tax claims —which all but assures that California will be unable to recover its full tax claim regardless of any discrepancy in valuation.

Texas' argument is an ill-disguised attempt to obscure the central fact in this case: that at any given value, the combined tax claims of California, Texas and the United States will substantially exceed the value of the Estate. This can be

demonstrated as a matter of simple arithmetic, since the relevant effective rates of tax exceed 100%.[3]

Assume, for example, that the three taxing authorities ultimately conclude that the value of the gross Estate is identical to that found by the IRS, or $468,085,903. As shown in Appendix A, in that event the combined effective tax rates would exceed 100% (60.7% + 24% + 16%), and the taxes imposed without accounting for interest would equal $404,586,316, exceeding the federal net taxable estate of $398,466,699 by over six million dollars.[4]

Such calculations, however, minimize the shortfall because they leave out one critical fact: Howard Hughes died over five years ago and all three tax claims have been steadily accruing interest since nine months after the date of death. The interest factor makes it even less likely that the Estate's assets will be sufficient to satisfy all three tax claims. Assume, for example, that each jurisdiction secured a final judgment on its tax claim a year from now, in July, 1982.[5] At that date, more than six years since Hughes' death and approximately five and one-half years since the several taxes became due and interest started running, the Texas tax would be increased by an interest factor of

---

[3] This is so because, as long as the Texas valuation is not substantially greater than that of the IRS, the effective Texas rate of tax will be equal to the federal credit for state death taxes of roughly 16%, which, when added to the California tax rate of 24.0% and the federal tax rate of 60.7%, produces a total effective tax rate of 100.7%. Texas admits that this situation is likely to occur, since it states that its valuation will be closer to that of the IRS than to California's. (Tex. Br. 10)

[4] The federal net taxable estate is the proper baseline by which to measure the availability of assets left to satisfy California's tax claim since the dollars expended by the Estate for expenses recognized as deductions on the federal estate tax return will obviously not be available to satisfy California's claim.

[5] This assumption is undoubtedly optimistic, for there is no realistic possibility that California—which has been enjoined from litigating domicile in its own courts since July, 1978— could achieve and perfect a final judgment in a year. The actual effect of interest on the tax claims will thus be greater than shown in Appendix A.

35.5%,[6] the federal estate tax by 48.6%[7] and the California tax by 66%.[8]

Applying these interest factors to the outstanding tax claims clearly shows the extent to which the Texas tax claim poses a threat of irreparable injury to California. If all three taxing jurisdictions were to reduce their tax claims to judgment by July, 1982, the net estate available to satisfy these claims ($398,466,699) would not even be sufficient to satisfy the claims of the federal government and the state of Texas. California's tax claim would be entirely wiped out. Because the federal tax claim enjoys a statutory priority over that of California (31 U.S.C. § 191)[9] and because Texas has obtained a judgment in its state courts before the states were enjoined by federal district court from proceeding in other forums, the likelihood is great that California will be left high and dry.[10]

---

[6] The Texas tax rate was 6% until January 1, 1980 and 7% thereafter. *Compare* TEX. TAX-GEN. ANN. art. 14.17 (1971) with *id.* (Supp. 1980). Applying these rates to the five and a half year period between January, 1977 (nine months after Hughes died) and July, 1982, gives an approximate rate of 35.5% ((3 x 6%) + (2½ × 7%)).

[7] The applicable federal rate of interest was 7% until February 1, 1978, 6% from then until February 1, 1980 and 12% thereafter. *See* 8 CCH STANDARD FEDERAL TAX REPORTER ¶ 5519K.02 (1981). Interest on the federal tax, like that of the two state taxes, started running on January 5, 1977. 26 U.S.C. §6075(a). Assuming that the federal rate remains at 12% until July, 1982 (which is not an unrealistic assumption given today's interest rates), the applicable federal interest rate is thus approximately equal to (7% × 1½) + (6% × 2) + (12% × 2½) or 48.6%.

[8] The California tax accrues at an interest rate of 12% which, when applied to the five and one-half year period between January 1977 and July, 1982, gives an interest rate of 66%. CAL. REV. & TAX. CODE §14211 (Supp. 1980).

[9] This statute contains an exception for proceedings under the Bankruptcy Act, where the statutory priority in favor of the United States does not apply. But the Estate cannot invoke the protection of that Act, since an estate is not a "person" (as defined in 11 U.S.C. § 101(12)) which can be the subject of bankruptcy proceedings. 11 U.S.C. § 109; 2 COLLIER ON BANKRUPTCY, ¶ 101.30, p.101-65 (15th ed. 1980).

[10] Texas admits that the table set forth in its brief (Tex. Br. 10) fails to account for the interest accruing on the unpaid tax claims. It implies, however, that this factor is offset by the "tremendous increase in the value of the estate attributable to the profitability of Summa Corporation during the five years since Hughes' death on April 5, 1976." (Tex. Br. 10-11 n.6). This

(footnote continued on following page)

For these reasons, there is every likelihood that the Estate, which faces a federal tax lien entitled to statutory priority and a Texas judgment already on appeal, will be substantially, if not totally, depleted by the time California is able to obtain a state court judgment on its tax claim. Although Texas posits hypothetical circumstances which could reduce this shortfall, its brief admits that it has no "hard figures" (Tex. Br. 11) on the only factor which could, at best, minimize the shortfall: the profitability of Summa. Its speculation that the controversy between it and California will be eliminated by the remaining state court litigation over the "lost will" (which has been rejected by a final judgment in Nevada, *see* Complaint ¶ 17) and heirship claims by persons contending with no discernable basis in fact to be widows and children of Hughes, is unfounded. And with each passing day, the aggregate interest accruing on all the tax claims increases the likelihood that California will be left unsatisfied. All these factors bring this case squarely within the original jurisdiction of the Court established in *Texas* v. *Florida*.[11]

(footnote continued from preceding page)
equation ignores the fact that the interest accruing against the Estate is certain and definite while Summa's profitability over the last six years is unknown, as even Texas admits that there are no "hard figures" on the profitability of Summa during the relevant period of time. (*Id.* 11). Indeed, there is evidence of the fact that Summa incurred substantial losses in the first two years following Hughes' death. *See* Reply to Brief in Opposition to Motion for Leave to File Complaint in *California* v. *Texas* (No. 76, Original) 6-7 and Ex. A. And whether Summa will make a profit in the future so that the Estate will be able to pay all three taxes if it utilizes an installment payment device (*see* Tex. Br. 11 n.7) is, of course, even more speculative. (Indeed, nothing in the record indicates that the Estate has qualified or can qualify for any discretionary or elective deferment of the estate tax through installment payments permitted under the Code. *See* 26 U.S.C. 6166A(a) and Treas. Reg. § 20.6161-1(b).)

[11] An additional factor which enhances the likelihood that California will be unable to collect the tax due it is the fact that California imposes severe limits on the deductibility of costs of administration and fees for attorneys, executors and administrators. While such expenses are deductible for federal estate tax purposes if they are authorized under state law and, in the case of attorney's and executor's fees, approved by a probate court, California limits deductibility to a small percentage of the estate's value for attorney's and executor's fees and permits deduction only of the ordinary costs of administration. *Compare* 26 U.S.C. § 2053 with CAL. REV. & TAX. CODE § 13998, CAL. PROB. CODE §§ 901, 910, and 18 CAL. ADMIN. CODE § 13988.6. The California tax claim is thus a somewhat greater proportion of the federal net estate than the 24.0% figure would indicate.

II.

TEXAS V. *FLORIDA* SHOULD NOT BE OVERRULED.

In California's initial memorandum, we showed that *Texas* v. *Florida* is not "a derelict on the waters of the law" (*Lambert* v. *California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting)), but merely an application of "accepted doctrines of ... equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court." *California* v. *Texas*, 437 U.S. 601, 615 n.15 (Stewart, J., concurring). In particular, we demonstrated that *Texas* v. *Florida* stands squarely in a long line of cases decided both before and after 1939 which hold that a claimant possessing one of several legally inconsistent claims to a fund may invoke equity jurisdiction to compel both the stakeholder and the rival claimants to litigate their claims in a single forum. (Cal. Mem. 28-37).

The response of Texas to this line of argument is largely to ignore it. It does not dispute that since at least 1888 (the date of *Pacific National Bank* v. *Mixter*, 124 U.S. 721), claimants with inconsistent claims, as well as stakeholders, have been able to invoke the aid of equity to free themselves from the risk and expense of multiple litigation. Nor does it dispute that *Texas* v. *Florida*—and, indeed, this case—involve rival, inconsistent claims. Instead, it rests its opposition to *Texas* v. *Florida* on a series of propositions which are factually and legally irrelevant.

Texas' first line of defense is that this suit is "over money, not domicile or the right to tax." (Tex. Br. 14). Texas argues that this suit presents no greater controversy between states than would be the case if each state were seeking to impose death taxes on bases which were not legally inconsistent or had altogether different claims. But, contrary to Texas' position, the legal inconsistency of the claims of California and Texas is not a matter of legal theory irrelevant to the injury suffered by California in this case. If and when Texas collects its death tax from the Estate, it will be collecting dollars *which should have gone* to California, because Hughes was a California domiciliary and not one of Texas. California, however, would have no

such claim against Texas if the Texas tax were imposed upon the Estate on some other basis not inconsistent with California's domicile claim.

Moreover, as shown in California's initial memorandum, Texas and California are more than unsecured creditors seeking payment from a limited fund. This is so because each state claims a lien on the Estate's assets to secure payment of the taxes allegedly owed to it. What California seeks here is to remove the cloud which Texas has placed upon the title to California's lien in order to protect California's security interest in the Estate's assets. This form of relief is well known in equity. (Cal. Mem. 31).

Texas also argues that "the nature and magnitude of any potential injury to California do not warrant an exercise of original jurisdiction." (Tex. Br. 15). If Texas means to imply by this statement that original jurisdiction is unavailable over disputes between states which involve "only" money, it is simply incorrect. *See, e.g., South Dakota* v. *North Carolina*, 192 U.S. 286 (1904) (suit by one state on bonds issued by defendant state); *Virginia* v. *West Virginia*, 246 U.S. 565 (1918) (suit to force payment of a share of one state's debt assumed by another when the two states split up).

Nor, as Texas implies (Tex. Br. 15-16), is the size of the claim too insignificant to invoke the original jurisdiction. Even if California is able to collect 23% of its 24% tax claim, and even accepting the IRS valuation, the remaining 1% of this $400 million estate is $4 million, hardly an insignificant sum. And as shown above, there is a substantial likelihood that California's entire tax claim, which may well amount to as much as $164,000,000, will be completely wiped out.[12]

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[12] The quote from *Massachusetts* v. *Missouri* on page 15 of the Texas Brief is completely inapposite. As the context of the cited sentence makes clear, it merely stands for the principle that the Court will not exercise its original jurisdiction where the plaintiff state has available to it alternative forums. In that case, since Massachusetts was attempting to sue citizens of Missouri, the Court held that it could proceed either in the Missouri state courts or the federal district court in that state. In the present case, however, no alternative forum is available. (*See* Cal. Mem. 15-28 and pp. 13-15, *infra.*)

Next, Texas contends that resort to the original jurisdiction to resolve domicile disputes is unwarranted because it would deprive "the parties" of the right of jury trial. (Tex. Br. 16). The Texas Brief, however, identifies no source for such a "right," inasmuch as it recognizes that 28 U.S.C. § 1872 does not apply to suits between states. *Id.* But the Court's original and exclusive jurisdiction over controversies between states is not confined to actions in equity; and the potential loss of a state's right to have its claim tried before a jury elsewhere is entirely irrelevant.

Texas also argues (Tex. Br. 17-19) that this case is distinguishable from the escheat cases since only one state can escheat abandoned funds, while several states may constitutionally collect death taxes. *California* v. *Texas*, 437 U.S. at 612 n.13. Texas says that the logic of California's argument "would not only permit but require an original action in every . . . domicile dispute . . . ." (Tex. Br. 18).

This argument, too, is wide of the mark. California cited the escheat cases for the proposition that where two states possess rival, inconsistent claims, each may sue the other under the Court's original jurisdiction without waiting for a demonstrable certainty that the two states' claims will collide. Nothing in California's initial memorandum or in any pleading filed by it either states or suggests that each state *must* file an original action in every domicile dispute. Indeed, as Texas notes, California took the opposite view in the interpleader action. Nor does the logic of California's position require the Court to hold that its original jurisdiction may be invoked where the taxes claimed do not exceed the Estate's assets. For in that event, the dollars which go to each state do not deprive the other of the chance to collect on its tax claim and there is thus no controversy between states. It is precisely because the original jurisdiction depends on injury to the plaintiff state—and not injury to the taxed estate—that the original

jurisdiction logically depends on depletion of the Estate's assets.[13]

Finally, Texas contends that if the Court were to exercise its original jurisdiction, it should divide the assets of the Estate between the states in proportion to the relative strengths of their claims. (Tex. Br. 14). It then argues that this "drastic remedy" should not be invoked until each state has obtained a judgment in its own courts. *Id.* This argument is an obvious *non-sequitur.* As shown in our initial memorandum (Cal. Mem. 30 n.14), the question of what rule might govern the resolution of this case once the original jurisdiction has been upheld has no bearing on the question of whether the jurisdiction should be invoked *ab initio.* Moreover, it is far from clear that such an equitable allocation—as opposed to a determination of which state's domicile claim was correct—would be appropriate. *Id.*

As for the suggestion that California should be forced to wait until it has secured a judgment in its own courts that Hughes was a California domiciliary, this would subject California to the very real risk that, prior to that time, Texas will have perfected and satisfied the judgment it has already obtained in the Texas courts. Thus, while *res judicata* would not bar California from continuing to press its domicile claim (*see California* v. *Texas*, 437 U.S. at 614 (Stewart, J., concurring)), there might simply be no assets available upon which California could levy. *See* pp. 6-7, *supra.*

Texas v. *Florida* should not be overruled. Its jurisdiction serves to protect states in those cases, thankfully relatively rare,[14] where the assertion of rival and legally inconsistent tax

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[13] Of course, as Justice Stewart has recognized, the unfairness to the estate may be just as great or greater in the situation where it can afford to pay both tax claims as in the case where the estate is totally depleted. *California* v. *Texas*, 437 U.S. at 611 (Stewart, J., concurring). But unfairness to an estate cannot be a predicate for invocation of the Court's original jurisdiction over controversies between states.

[14] The Court need have no fear that accepting original jurisdiction in this case will open the floodgates to the Court's original jurisdiction. In the more than forty years since *Texas* v. *Florida* was decided, the Court has not been overburdened with double domicile litigation, since only one case—this

(footnote continued on following page)

claims by other states threaten to deprive them of millions of dollars in taxes which are rightfully theirs. It may be, as Texas claims, that such controversies will arise only with respect to "the estates of the most wealthy and most mobile persons." (Tex. Br. 17). But in such cases, the Court's original and exclusive jurisdiction should be available to protect each state from suffering a multi-million dollar injury at the hands of another.

III.

THERE IS NO ALTERNATIVE FORUM.

Part II of Texas' Brief in Opposition largely repeats the arguments already made by its Attorney General and Comptroller in their response to the Petition for Certiorari in *Cory* v. *White*, No. 80-1556. The California Petitioners have already responded to these arguments in their Reply Brief on Certiorari (hereafter "Pet. Rep. Br."), which the Court has indicated it will consider in tandem with this motion. A few additional points, however, are worthy of note.

Texas cites *Illinois* v. *Milwaukee*, 406 U.S. 91, 93-94 (1972) for the proposition that the Court's original and exclusive jurisdiction is obligatory only when no alternative forum is available. In that case, however, the Court held that the action presented was not a suit between states, but rather a suit between one state and political subdivisions of another, which were citizens of the latter state. That being the case, the suit was maintainable in a federal district court and the Court therefore declined to exercise its original jurisdiction. Nothing in *Illinois* v. *Milwaukee* stands for the proposition that the Court's exclusive original jurisdiction will not be invoked in a

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one—has arisen since that time. Moreover, as Texas points out, the recent reduction in the maximum federal estate tax has reduced the likelihood that such suits will recur in the future. (Tex. Br. 16-17). And the reaffirmation of original jurisdiction in this instance might serve to spur on those states—such as Texas—which have failed to enact mandatory arbitration statutes for the resolution of such controversies. *See, e.g.*, CAL. REV. & TAX. CODE §§ 14199-14199.13.

case such as this where, because of the original jurisdiction's exclusive character, no alternative forum exists.[15]

As just noted, the principal reason why interpleader jurisdiction is not available to resolve this controversy in the district courts is that this domicile dispute is a controversy between states within the Court's exclusive and original jurisdiction. *See* Cert. Pet. at 7-9; Cal. Mem. 23; Pet. Rep. Br. 1-6. Texas does not deny that the rival claimants in the interpleader action are the states of California and Texas, not their respective taxing officials. Indeed, Texas has conceded that the interpleader action is a controversy between states, since its motion to dismiss that action for lack of jurisdiction stated that "[t]he non-estate claimants here are in reality California and Texas." Brief in Support of Motion to Dismiss 5.

Instead, Texas argues that 28 U.S.C. § 1335 supersedes the exclusivity provision of 28 U.S.C. § 1251(a), citing *United States* v. *California*, 297 U.S. 175 (1936); *Case* v. *Bowles*, 327 U.S. 92 (1946); and *Minnesota* v. *United States*, 125 F.2d 636 (8th Cir. 1942). Our Reply Brief on Certiorari showed in some detail why these cases are inapposite. (Pet. Rep. Br. 2-6). Texas has made no effort to show that California's contentions in this regard are erroneous.

Finally, Texas attacks California's submission that the federal district courts are inappropriate forums for resolution of domicile controversies between states because such courts usually will be located, as they are in this case, in one or the other of the rival claimant states. But Texas' paean to the quality of justice dispensed by federal district judges in Texas, though undoubtedly well-deserved, is quite beside the point. The fact that federal diversity courts were intended to be "national

[15] Nor is *Arizona* v. *New Mexico*, 425 U.S. 794 (1976), any help to Texas. There the Court denied Arizona leave to file a bill of complaint, holding that resort to the original jurisdiction was unnecessary because the issues which Arizona presented to the Court were being litigated in the New Mexico state courts by private parties. In this case, however, California has no surrogates—like the Arizona utilities in *Arizona* v. *New Mexico*—to plead its case in some other forum, even if one were otherwise available. *See* California's Petition for Certiorari in *Cory* v. *White* (No. 80-1556) 8 n.8.

tribunal[s]" (*Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 289 (1888)), through which litigants could escape local prejudice, does not insure that a fair trial automatically can be had in every diversity case. While it may be assumed that federal *judges* will dispense even handed justice, there can be no conclusive presumption that local *juries* will be immune from parochial concerns. Should this Court remit this controversy to a federal district court, it will be the first time in our nation's history that a dispute between states has been tried in such a forum.[16] Such an extraordinary event demands an appropriate safeguard against the taint or even the appearance of local prejudice, a "neutral forum" which will normally be unavailable in interpleader actions of this kind. As presently constituted, therefore, federal interpleader jurisdiction under 28 U.S.C. § 1335 is an inappropriate means for resolving death tax controversies between states; indeed, for the reasons already mentioned here and in our initial Memorandum, interpleader jurisdiction is unavailable. The only means by which this controversy can be resolved is through the exercise of the

[16] *Arizona* v. *New Mexico*, *supra*, is not an exception to this statement. There the state court case which resolved the underlying dispute was a controversy between private utilities and a state, not between two states. *See* n. 15, *supra*, and *Arizona Pub. Serv. Co.* v. *Snead*, 441 U.S. 141 (1979).

CONCLUSION

California's Motion for Leave to File Complaint should be granted.

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Respectfully submitted,

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APPENDIX A

	Valuation of Gross Estate	Taxable Estate	Approximate Effective Rates of Tax	Tax	Applicable Interest Rate As of 7/82	Total Tax
U.S.	$468,085,903	$398,466,699	60.7%	$241,976,486a	48.6%	$359,577,058
California	468,085,903	414,218,015	24.0%	99,378,758	66.0%	164,968,738
Texas	468,085,903	398,466,699b	16.0%c	63,231,072	35.5%	85,678,103
			100.7%	$404,586,316		$610,223,899
		Net Estate				398,466,699
		Deficit				$211,757,200

[a] Source: Tex. Br. 10.

[b] We have assumed that Texas uses the same deductions as the federal return.

[c] Since the 15.0% Texas rate is less than the 16% "pick-up" rate, Texas would collect the "pick-up" tax if its valuation were identical to that of the IRS. Texas has calculated this tax as the amount shown in the table.